Supreme Court, U.S.
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No. 07-353

In the Supreme Court of the United States

JOSE SANCHEZ, et al.,

Petitioners,

v.

TRIPLE-S MANAGEMENT, CORP., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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September, 2007

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QUESTION PRESENTED

Whether Fed. R. Civ. P. 23 and 56 enable a federal district court to convert an opposition to a motion for class certification to a *sua sponte* summary judgment motion and grant *sua sponte* summary judgment when the evidentiary record is not complete and the only discovery that has been undertaken relates to issues of class certification.

PARTIES TO THE PROCEEDINGS

In addition to Petitioner, Nilsa Irizarry, Conjugal Partnership, Sanchez-Irizarry, d/b/a Laboratorio Clinico Irizarry Guash, Delma Rodriguez, Wilmer Roldan, Conjugal Partnership Roldan-Rodriguez, d/b/a Laboratorio Salimar, Maite Rolon-Balseiro, Cesar Del-Valle-Vague, Conjugal Partnership Del-Valle-Rolon, d/b/a Laboratorio Clinico Rolon, OIM Enterprises, Inc., d/b/a Laboratorio Clinico Ramos, Jose Zayas, Ana Hernandez-Rivera, Conjugal Partnership Zayas-Hernandez, Nestor Allende-Ortiz, Rosa Asparo-Plana, Conjugal Partnership Allende-Asparo, Medical Geriatrics And Administrative Services, Inc., Outpatient Administrative Services, Inc., Jose E. Varela-Rosario, Migdalia Quiles-Rodriguez, Conjugal Partnership Varela-Quiles, d/b/a Farmacia San Jose d/b/a Farmacia De Aquí, Lydia Ayala-Diaz, Daisy Morales-Perez and Carmen Ortiz-Roque were named as Plaintiffs in the trial court and are Petitioners here.

STATEMENT PURSUANT TO RULE 29.6

Petitioner OIM Enterprises, Inc. has no parent corporation and no corporation owns ten percent or more of its stock.

Petitioner Medical Geriatrics, Inc. has no parent corporation and no corporation owns ten percent or more of its stock.

Petitioner Outpatient Administrative Services, Inc. has no parent corporation and no corporation owns ten percent or more of its stock.

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Petitioners petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 492 F.3d 1. The opinion and order of the district court dismissing the present case (Pet. App. 31a-54a) is reported at 446 F.Supp.2d 48. The order to show cause as to why it should not grant *sua sponte* summary judgment issued by the district court (Pet. App. 55a-78a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-25a) was entered on June 13, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Rule 23 of the Federal Rules of Civil Procedure provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in

the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is sued as a representative of a class, the court must--at an early practicable time--determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,

- that a class member may enter an appearance through counsel if the member so desires,

- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and

- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all

of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

• the work counsel has done in identifying or investigating potential claims in the action,

• counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

• counsel's knowledge of the applicable law, and

• the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class

counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D)

Rule 56 of the Federal Rules of Civil Procedure provides:

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory

judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of

damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order

the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

Petitioners brought suit seeking damages arising from Respondents' racketeering schemes which were perpetrated in violation of the RICO Act. Petitioners filed their original Complaint on September 4, 2003. The district court had jurisdiction of the action pursuant to 28 U.S.C. § 1331.

On January 7, 2004, the Triple-S entities filed a motion to dismiss which MC-21 joined. The parties fully briefed the issues raised by Respondents. On March 4, 2005, the district court issued an opinion and order granting in part and denying in part Respondents' motions to dismiss and ordering Petitioners to plead Count VIII with more specificity. On March 24, 2005, Petitioners filed an amended complaint in accordance with the district court's opinion and order of March 4, 2005. The district court then issued its order denying the remaining issues raised by the motion to dismiss on March 31, 2005.

The parties jointly filed a proposed scheduling order, which was later amended by the parties, bifurcating class certification and merits discovery, allowing over four months for class certification discovery and allowing in excess of six months after class certification for merits discovery to take place, with dispositive motions to be filed at the end of merits. The district court adopted and endorsed this schedule. From June through October 2005 the parties conducted discovery addressing class certification issues.

On November 30, 2005, in accordance with the amended agreed schedule, the Petitioners filed a motion for class certification. The Respondents filed their respective oppositions attacking the merits of the certification and raising other issues. The issues were fully briefed.

Without allowing merits discovery to occur and without making a determination on class certification, on March 17, 2006, the district court issued an order to show cause as to why it should not grant *sua sponte* summary judgment in favor of the Respondents. (Pet. App. 55a-78a).

Petitioners responded and opposed, providing declarations submitted by all the class representatives, the liability and damages experts and counsel specifically emphasizing that there had been no opportunity to conduct merits discovery and develop a complete record. Respondents replied, and on May 5, 2006, the district court issued an opinion and order granting *sua sponte* summary judgment and dismissing the case. (Pet. App. 31a-54a). Petitioners filed a timely notice of appeal on May 17, 2006 and the parties fully briefed the issues to the court of appeals. On June 13, 2007, the court of appeals affirmed. (Pet. App. 1a-30a).

REASONS FOR GRANTING THE PETITION

District Courts are widely acknowledged to possess the power to enter summary judgment *sua sponte*. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Courts may properly exercise this power when there is a full evidentiary record following discovery and adequate notice to the party opposing the motion. *Id.*; *Artistic Entertainment, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1202 (11th Cir. 2003); *Berkowitz v. Home Box Office, Inc.*, 89 F.3d 24, 28-30 (1st Cir. 1996). Here, these requirements were not met when the

district court converted an opposition to a Rule 23 motion for class certification into a *sua sponte* motion for summary judgment with an incomplete record before merits discovery had been conducted. This action conflicts with decisions from this Court and other circuits which have condemned an inquiry into the merits during class certification and which have found that a complete evidentiary record is required before the granting of *sua sponte* summary judgment. Furthermore, the court of appeals' decision condones actions by the district court which depart from the accepted course of judicial proceedings. Review by this Court is necessary to preserve the vitality of this Court's previous decisions and to prevent disarray in the court of appeals regarding when it is appropriate for a district court to grant *sua sponte* summary judgment. As a result, this Court should exercise its supervisory power.

A. The Court of Appeals' Decision Affirming a Conversion of a Motion Under Rule 23 to a *Sua Sponte* Motion for Summary Judgment Conflicts With Previous Findings by this Court and Other Circuits

The court of appeals' decision affirming a conversion of an opposition to a motion for class certification under Rule 23 to a *sua sponte* motion for summary judgment ignores the precedent of this Court and conflicts with the findings of other circuits. In fact, this Court has found that "[there is] nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the rule[.]" *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). Additionally, the advisory notes to Rule 23 state that "an evaluation of the probable outcome of the merits is not

properly part of the certification decision." Fed.R.Civ.P. 23(c)(1) advisory committee note (2003). Furthermore, the Fifth Circuit has found that:

> In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met. The determination whether there is a proper class does not depend on the existence of a cause of action. A suit may be a proper class action, conforming to Rule 23, and still be dismissed for failure to state a cause of action (citations omitted). Rule 23 delineates the scope of inquiry to be exercised by a district judge in passing on a class action motion. Nothing in that Rule indicates the necessity or the propriety of an inquiry into the merits. Indeed, there is absolutely no support in the history of Rule 23 or legal precedent for turning a motion under Rule 23 into a . . . Rule 56 motion for summary judgment by allowing the district judge to evaluate the possible merit of the plaintiff's claims at this stage of the proceedings.

Miller v. Mackey Int'l., Inc., 452 F.2d 424, 427 (5th Cir. 1971). Thus, it was clearly inappropriate for the court of appeals to affirm the conversion of an opposition to a motion for class certification under Rule 23 to a *sua sponte* motion for summary judgment.

B. The Court of Appeals' Decision Finding that *Sua Sponte* Summary Judgment was Appropriate Without a Full Evidentiary Record Conflicts With Relevant Decisions of this Court and Other Circuits and Departs From the Accepted Course of Judicial Proceedings

Even if the district court's inquiry into the merits of the case during class certification was appropriate, the conversion of an opposition to a motion for class certification to a *sua sponte* motion for summary judgment was inappropriate given the fact that discovery had been bifurcated and the parties had only performed discovery as to the issues of class certification. A court may only move for summary judgment on its own motion when there exists: (1) a full evidentiary record following discovery and (2) adequate notice to the party opposing the motion. *Celotex Corp.*, 477 U.S. at 325-326; *Artistic Entertainment, Inc.*, 331 F.3d at 1202. This means a full discovery record. *Id.*; *see also E.g., Berkowitz*, 89 F.3d at 28-30.[1] In *Berkowitz*, the court of appeals limited "unbesought summary judgment" to extremely limited situations procedurally, only after full discovery had occurred, and in a case where the district court had conducted a series of pretrial conferences. The cases assume that a full discovery record has been developed so that a party can marshal all available evidence and respond accordingly. *See Bank v. Int'l. Bus. Machs. Corp.*, 145 F.3d 420, 431 (1st Cir. 1998) (finding that if the district court had been deciding an

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[1] In *Celotex*, the parties had conducted full discovery. 477 U.S. at 326. Therefore, in the present case, unlike the *Celotex* petitioner, the Petitioners here can legitimately claim that they have been "blindsided" by a premature motion for summary judgment. *Id.* (noting such claim could not be made if discovery had occurred).

issue of fact additional discovery would have been appropriate before granting *sua sponte* summary judgment).

Other circuits reviewing *sua sponte* summary judgment have been concerned with the evidentiary record before the trial court. *See Ramsey v. Coughlin*, 94 F.3d 71, 74 (2nd Cir. 1996) (finding that in order for *sua sponte* summary judgment to be appropriate discovery must either be completed or it must be clear that further discovery would be of no benefit and reversing a district court's grant of *sua sponte* summary judgment in favor of defendants because "an orderly and reviewable record did not exist"); *Page v. DeLaune*, 837 F.2d 233, 238 (5th Cir. 1988) (finding that the district court acted appropriately when it granted *sua sponte* summary judgment when both parties had submitted motions for summary judgment and the parties had completed discovery). Even this Court has expressed the requirement of adequate discovery when dealing with *sua sponte* summary judgment. *See Celotex*, 477 U.S. at 326 (noting that a claim that the party was "railroaded" could not be made if discovery had occurred).

Here, a full evidentiary record had not been developed where discovery on the merits not only had not been conducted, but the parties had agreed and the Court had endorsed that such discovery would require more than six months after certification had been addressed. "When a court announces that it will follow a procedural course, the parties are entitled to rely on that announcement unless and until the court signals an impending change and affords a reasonable opportunity to regroup." *Leyva v. On The Beach, Inc.*, 171 F.3d 717, 720 (1st Cir. 1999); *NL Indus., Inc. v. GHR Energy Corp.*, 940 F.2d 957, 965 (5th Cir. 1991). The clear division between certification and merits discovery within the Scheduling Order shows that the Petitioners could never

provide the kind of information the Court was asking them to produce. In recognition of the significant amount of time merits discovery would entail, the Scheduling Order allocated no less than six months to conduct merits discovery, but only after the conclusion of class certification discovery. It also contemplated that any dispositive motions would be filed on or around September 10, 2006, or earlier, but only if the issues were ripe. Thus, when the district court suddenly shifted gears and blindsided the Plaintiffs by changing the rules midstream, this imposed an extreme burden and undue prejudice upon the Plaintiffs, requiring them to present the factual evidence necessary to prove their case before discovery had even taken place.

The court of appeals argues that they have previously affirmed a granting of *sua sponte* summary judgment even though discovery has not been completed. (Pet. App. 12a-14a). In support of this proposition, the court cites several of its own cases. Yet none of these cases are analogous to the present case. Particularly, in all of the cases cited by the court of appeals, unlike the present case, the parties had conducted merits discovery to the point where the parties understood the material facts and could present evidence on the essential elements of the claims and defenses. *See Penobscot Indian Nation v. Key Bank of Me.*, 112 F.3d 538, 562 (1st Cir. 1997) (the parties had performed substantial discovery as to the merits of the suit and had compiled voluminous records that included the depositions of al the parties involved); *Frederique-Alexandre v. Dep't. of Natural & Envtl. Res.*, 478 F.3d 433, 439 (1st Cir. 2007) (discovery had proceeded to the point where the non-targeted party had moved for summary judgment on relevant issues). In fact, in *Aetna Cas. Sur. Co. v. P & B Autobody*, one of the cases cited by the court of appeals, discovery was not merely "sufficiently advanced," it was complete and a trial on

liability had been completed. 43 F.3d 1546, 1568 (1st Cir. 1994).

The court of appeals also relies on *Bank v. Int'l Bus. Machs.*, 145 F.3d at 420, for the proposition that *sua sponte* summary judgment can be granted even before any discovery has taken place. (Pet. App. 13a). In *Bank*, the court granted *sua sponte* summary judgment on a legal issue, namely the interpretation of an unambiguous contract. *Id.* at 431. In fact, the court of appeals admitted that if the district court had been deciding an issue of fact, additional discovery would have been appropriate before granting *sua sponte* summary judgment. *Id.* The present case is not a case dealing with purely legal issues. The *sua sponte* summary judgment in this case, dealt with an issue of fact, i.e., whether Petitioners had enough evidence to support their RICO claims, evidence which they had not yet been given an opportunity to obtain through merits discovery. (Pet. App. 76a-77a). Thus, *Bank* is not applicable to the present case. Furthermore, other circuits have distinguished between *sua sponte* grants of summary judgment in cases involving legal questions based on complete evidentiary records, and cases involving factual disputes where the non-moving party has not been afforded an adequate opportunity to develop the record. *See Artistic Entertainment, Inc.*, 331 F.3d at, 1201; *Gibson v. Mayor and Council of the City of Willmington*, 355 F.3d 215, 224 (3rd Cir. 2004); *Massey v. Congress Life Ins. Co.*, 116 F.3d 1414, 1418 (11th Cir. 1997). As was explained above, this is not a case dealing with purely legal issues nor is there a complete evidentiary record.

Unlike the cases cited by the court of appeals, discovery in the present case had not reached the point where the parties understood the material facts and could present evidence on the essential elements of the claims and defenses. Discovery

concentrated on issues pertaining to class certification, not the merits. Petitioners were not able to present the evidence on essential elements because they never had an opportunity to get the evidence, since discovery was bifurcated as to certification and merits. This is especially true since all the evidence required to defeat the *sua sponte* summary judgment exists in the hands of the Respondents. *See Andersen v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (must give plaintiff opportunity of full discovery when evidence in possession of defendant)

The court of appeals attempts to show that discovery was sufficient by doing a quantitative analysis of the discovery procedures while disregarding the qualitative aspect of discovery. (Pet. App. 8a). The court fails to look at the substance of the discovery performed and instead focuses on how extensive it looks. The clear division between certification and merits discovery within the scheduling order shows that the Petitioners could never provide the kind of information the district court and court of appeals say they must produce. Furthermore, the court of appeals erred when they stated that the incidental overlapping of some issues regarding the merits yielded enough evidence to meet the "complete evidentiary record" requirement of *sua sponte* summary judgment. During the certification process there was some minor and insignificant overlap with merits to the extent that there were general template documents produced by the Respondents and Fed.R.Civ.P. 30(b)(6) deposition testimony taken of certain of the corporate representatives. This discovery was necessary for certification purposes, yet involved very narrowly restricted issues on the merits. Although some documents produced in certification may overlap with merits, the overlap was only to the extent that certification documents, along with other documents not yet discovered, would necessarily be used to demonstrate

liability, not vice versa. The record shows that the discovery performed addressed certification issues and not merits as Defendants claim. Furthermore, the record clearly shows that the parties were never in agreement as to the status of discovery. Based on precedent by the court of appeals, this discrepancy is enough to find that discovery has not advanced sufficiently to grant *sua sponte* summary judgment. *See Leyva*, 171 F.3d at 720 (the court of appeals found that it was unclear whether the discovery process was sufficiently advanced to grant *sua sponte* when the parties disagreed about the status of pretrial discovery).

The court of appeals states that *sua sponte* summary judgment was appropriate largely due to the fact that "the district court decided to consider sua sponte summary judgment against plaintiffs based on what they said in their own depositions." (Pet. App. 14a-15a). The court of appeals found "discovery obtained from defendants could not have altered the outcome." (Pet. App. 14a-15a). The court of appeals ignores that counsel for Petitioners understood these depositions to relate only to issues pertaining to class certification. If counsel had understood that these depositions were being taken to perform merits discovery, the depositions would have been more in depth and counsel would have made sure that issues relating to merits would have been clarified on the record. The court of appeals reached this conclusion even though, it has been established, by the court of appeals and other circuits, that courts contemplating the entry of summary judgment "cannot simply presume that plaintiffs will lose difficult cases and act accordingly." *Leyva*, 171 F.3d at 717; *NL Indus., Inc. v. GHR Energy Corp.*, 940 F.2d 957, 965 (5th Cir. 1991) ("[Rule 56] does not ask which party's evidence is more plentiful, or better credentialed, or stronger"). Petitioners showed what additional information they needed in order to "to present [their] evidence on essential elements."

This list of additional information also shows why the conclusion that further discovery would be of no benefit is erroneous since the information was needed in order to address the same areas of inquiry the district court and court of appeals found the Petitioners had failed to prove. The actions by the district court and its approval by the court of appeals "conflict with traditional adversarial concepts of justice to the extent that they make the district court 'a proponent rather than an independent entity'." *Doe on Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 411, 415 (7th Cir. 1986). It is clear that the court of appeals' decision finding that *sua sponte* summary judgment was appropriate without a full evidentiary record conflicts with relevant decisions of this Court, other circuits, its own previous decisions and departs from the accepted course of judicial proceedings.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 06-1925

[Filed June 13, 2007]

JOSE SANCHEZ;	)
NILSA IRIZARRY;	)
CONJUGAL PARTNERSHIP	)
SANCHEZ-IRIZARRY,	)
d/b/a, Laboratorio Clinico Irizarry Guash;	)
DELMA RODRIGUEZ;	)
WILMER ROLDAN;	)
CONJUGAL PARTNERSHIP	)
ROLDAN-RODRIGUEZ,	)
d/b/a Laboratorio Salimar;	)
MAITE ROLON-BALSEIRO;	)
CESAR DEL-VALLE-VAGUE;	)
CONJUGAL PARTNERSHIP	)
DEL-VALLE-ROLON,	)
d/b/a Laboratorio Clinico Rolon;	)
OIM ENTERPRISES, INC.,	)
d/b/a Laboratorio Clinico Ramos;	)
ELBA RIVERA-MARTINEZ;	)
CONJUGAL PARTNERSHIP	)
MELENDEZ-RIVERA;	)
JOSE ZAYAS;	)
ANA HERNANDEZ-RIVERA;	)

CONJUGAL PARTNERSHIP)
ZAYAS-HERNANDEZ;)
FRANCES GUTIERREZ-MARTINEZ;)
CONJUGAL PARTNERSHIP)
GARRATON-GUTIERR;)
NESTOR ALLENDE-ORTIZ;)
ROSA ASPARO-PLANA;)
CONJUGAL PARTNERSHIP;)
ALLENDE-ASPARO;)
MEDICAL GERIATRICS AND)
ADMINISTRATIVE SERVICES, INC.;)
OUTPATIENT ADMINISTRATIVE)
SERVICES, INC.;)
JOSE E. VARELA-ROSARIO;)
MIGDALIA QUILES-RODRIGUEZ;)
CONJUGAL PARTNERSHIP)
VARELA-QUILES,)
d/b/a Farmacia San José,)
d/b/a Farmacia De Aqui;)
ANA DELIA MARRERO;)
CONJUGAL PARTNERSHIP)
TORRES-MARRERO,)
d/b/a Farmacia San Antonio;)
ALICIA FELIBERTI-IRIZARRY;)
GUILLERMO J. FERNANDEZ;)
ELIZABETH SANCHEZ DE LEON;)
CONJUGAL PARTNERSHIP)
RUIZ-SANCHEZ;)
LYDIA AYALA-DIAZ;)
JULIA NAVEIRA;)
CONJUGAL PARTNERSHIP;)
VAZQUEZ-NAVEIRA;)
LUIS CARMELO ALAMO CRUZ;)
CONJUGAL PARTNERHSIP)
ALAMO-CRUZ;)

JOSE WILLIAM VAZQUEZ;)
ISOLINA RUIZ;)
JOSE VEGA;)
CONJUGAL PARTNERSHIPVEGA-RUIZ;)
FRANCES MATOS-ORTIZ;)
WILFREDO BURGOS SANTIAGO;)
CONJUGAL PARTNERSHIP)
BURGOS-MATOS;)
JOREALIS VIGO-GONZALEZ;)
AYMETTE VIGO-GONZALEZ;)
LENDIS OJEDA-ALEMANY;)
KARLA OJEDA-ALEMANY;)
DANIEL AQUINO RIVERA;)
DORIS MIRANDA RAMOS;)
CONJUGAL PARTNERSHIP)
AQUINO-MIRANDA;)
ALEJANDRA OJEDA-ALEMANY;)
DANIERIC AQUINO-MIRANDA;)
DARRYL AQUINO-MIRANDA;)
EDGARDO RODRIGUEZ-MARRERO;)
ROY BROWN;)
SAMMY GARAU-DIAZ;)
KETTY DIAZ-GARCIA;)
AEDNA MARTINEZ-LAZU;)
ANDRES ROMERO-DEST;)
ANA I. RODRIGUEZ-MARRERO;)
DAISY MORALES-PEREZ;)
CARMEN ORTIZ-ROQUE)
Plaintiffs, Appellants,)
)
v.)
)
TRIPLE-S MANAGEMENT, CORP.;)
TRIPLE-S, INC.;)
SEGUROS TRIPLE S, INC.;)

SEGUROS DE VIDA)
TRIPLE-S, INC., SSS;)
INTERACTIVE SYSTEMS, INC.;)
TRIPLE-C, INC.;)
ACCESSO-SALUD, INC.;)
MC-21 CORPORATION;)
CPA RAMON M. RUIZ-COMAS;)
MIGUEL VAZQUEZ-DEYNES;)
CRISPULO RIVERA-OFRAY;)
MD BELISARIO MATTA;)
MD FERNANDO L. LONGO;)
MD WILMER RODRIGUEZ-SILVA;)
MD FERNANDO YSERN-BORRAS;)
MD EMIGDIO BUONOMO;)
MD ANGEL W. HERNANDEZ-COLON,)
Defendants, Appellees.)
)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Before Lynch, Circuit Judge, Stahl, Senior Circuit Judge, and Howard, Circuit Judge.

OPINION

HOWARD, Circuit Judge. The plaintiffs appeal from the entry of summary judgment for the defendants on claims asserting violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* (2000) ("RICO"). We affirm.

I.

The plaintiffs commenced this suit as a putative class action, purporting to represent, among others, providers of medical products and services covered under policies issued or administered by the defendants, as well as the subscribers to those policies. The defendants include a number of insurance companies and similar businesses, such as claims administrators, who allegedly joined together with a number of others in a RICO "enterprise." 18 U.S.C. § 1961(4). The enterprise has allegedly engaged in efforts to "acquire control" of, "capitalize," and "convert" the assets of Triple-S, Inc., a now-defunct insurance company which, the plaintiffs say, had restricted the use of those assets to charitable purposes.[1]

The complaint asserted twelve numbered counts, each setting out a separate RICO violation in the form of a different scheme. In relevant part, these alleged schemes have enriched the enterprise by overcharging subscribers and underpaying providers for medical products and services that were covered under insurance policies issued by the defendant insurers. To carry out these schemes, the defendants have allegedly made a number of mailings in violation of the mail fraud statute, 18 U.S.C. § 1341, and transmissions in violation of the wire fraud statute, *id.* § 1343. One of the

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[1] With the exception of MC-21 Corporation, the defendant entities are subsidiaries of defendant Triple-S Management Corporation ("Triple S"), a holding company created when Triple-S, Inc. was reorganized. MC-21, for its part, is under contract with the defendant insurers to serve as the exclusive manager of the prescription drug benefits they provide; the plaintiffs allege that the other members of the enterprise "have a proprietary economic interest in MC-21, either directly, or indirectly."

schemes has also allegedly relied on extortion in violation of the Hobbs Act. *Id.* § 1951(b)(2). The plaintiffs characterize these crimes as the "pattern of racketeering activity" underlying their RICO claims. *See id.* § 1961(1).

In response to the complaint, the defendants moved to dismiss, arguing, *inter alia*, that the plaintiffs had failed to plead mail and wire fraud with the requisite particularity. *See* Fed. R. Civ. P. 9(b). The plaintiffs rejoined that, insofar as their claims relied on transmissions from the defendants to the plaintiffs, they had sufficiently pleaded them. In support of this point, the plaintiffs submitted an appendix explaining that "through their communications with the plaintiffs [*sic*] classes the defendants failed to disclose, misrepresented and covered up" the alleged overcharges and underpayments. The plaintiffs stated that the communications thus "misled them to believe that" they were paying the correct charge or receiving the correct payment.

The district court denied the motion to dismiss in part, ruling that the plaintiffs had adequately pleaded "communications that fraudulently induced Plaintiff subscribers and providers to accept lower reimbursements and higher charges."[2] Nevertheless, the district court ordered the plaintiffs to amend part of their complaint to identify certain of those communications in accordance with Rule 9(b). The plaintiffs then filed an amended complaint asserting only those four counts that had survived the motion to dismiss. Three of these counts alleged that the defendants made mailings and

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[2] The district court granted the motion as to other counts of the complaint on a number of grounds, including failure to plead them with particularity. The plaintiffs have not appealed from any aspect of the district court's ruling on the motion to dismiss.

wire transmittals "[f]or the purpose of executing and concealing" various "artifices," consisting of claim practices that have resulted in the overpayment of deductibles by subscribers or the underpayment of providers for their services to the subscribers.[3] The fourth count alleged that the defendants violated the Hobbs Act by threatening the providers with economic injury in the form of exclusion from the network of insurance plans administered by the defendants, audits of the providers' accounts, withholding of payments, and denial of patient referrals.

Subsequent to the amended complaint, the district court approved the parties' joint proposed scheduling order. The order provided that fact discovery would consist of two phases of roughly four months each, with the first to conclude before the plaintiffs filed their motion for class certification, and the second to commence after briefing on that motion had been completed. The order noted, however, that

> class certification discovery will in part overlap with merits discovery in that plaintiffs may request general or 'template' documents in addition to documents referring to the named plaintiffs and take [Fed. R. Civ. P.] 30(b) (6) depositions of the [defendant] corporations to ascertain their claims procedures...and similar factual issues without discovery as to damages and similar merit-intensive discovery.

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[3] The amended complaint also alleged, as additional predicate acts underlying one of these counts, violations of the anti-kickback provisions of the Medicare Act, 42 U.S.C. § 1320a-7b(b) (Supp. 2006). The plaintiffs, however, did not rely on this theory at summary judgment, and have not done so here. Accordingly, we do not consider it.

While the order provided a deadline for the filing of dispositive motions, it also noted that the "[p]arties may file dispositive motions earlier, if they understand that the issue(s) are ripe."

After several months of discovery, including the depositions of the named plaintiffs and Triple S (by way of several Rule 30(b) (6) designates) and the exchange of voluminous written discovery, the plaintiffs moved for class certification. The defendants opposed the motion on the grounds that, *inter alia*, the plaintiffs lacked standing to maintain the claims set forth in the amended complaint which, apart from being fatal to class certification in its own right, also meant that the plaintiffs could not satisfy the "typicality" and "adequacy" requirements of Fed. R. Civ. P. 23. The defendants argued that, according to the plaintiffs' own deposition testimony, they had suffered no harm from the alleged racketeering activity, *viz.*, the violations of the mail and wire fraud statutes and the Hobbs Act. In particular, the defendants noted that the plaintiffs could not say how the communications they received from the defendants concealed their alleged schemes.

In response, the district court issued an order directing the plaintiffs to show cause within ten working days why summary judgment should not enter against them based on the deficiencies in proof identified by the defendants. While the court acknowledged "that an objection to class certification is not the proper vehicle through which to attack standing," it reasoned that the "Defendants' arguments and the corresponding facts are so compelling that...it would be a poor use of judicial resources to proceed with class certification...without first establishing whether this case is even remotely viable."

Before reaching this conclusion, the court analyzed the plaintiffs' deposition testimony in detail, finding that it did not support their allegations of mail and wire fraud or extortion. The district court determined, for example, that none of the physicians serving as plaintiffs was "able to identify a single incident of fraudulent concealment" in the correspondence they received from the defendants. Yet the court recognized the possibility that the plaintiffs' "testimony as to whether or not their injuries were incurred through the transmission of 'fraudulent' communications or the infliction of 'extortion' relies on...incomplete understanding of various terms of art." Accordingly, the show cause order would "give Plaintiffs a last opportunity to present a crystal clear picture of how their allegations are factually supported." The court also preemptively rejected any argument that the incomplete state of discovery would prevent the plaintiffs from doing so, because their claims relied "on fraudulent communications that were delivered to [them] and on acts of extortion that were inflicted directly upon them."

Despite this admonishment, the plaintiffs rejoined that the district court would "create reversible error" by entering summary judgment before they had the opportunity to complete the discovery allowed by the scheduling order. The plaintiffs did not, however, ask for an extension of time to respond to the order to show cause. Instead, they submitted nearly three hundred pages of evidentiary materials, including the declarations of twelve plaintiffs and two expert witnesses and a number of exhibits. Each of the plaintiffs attested to receiving documents from at least one of the defendants, but stated:

> It is impossible for a layman or a Plaintiff or class representative to articulate the specifics of the scheme/fraud solely from the documents received

> from the Defendants because of the concealed nature of their fraud. Therefore, I rely on the experts hired for this case to explain how the Defendant's [*sic*] practices form a RICO scheme.

Each of the plaintiffs claimed that, for the same reason, he or she could not "articulate the specifics [*sic*] damages suffered from the scheme/fraud" and relied on the experts to explain that as well.[4]

The plaintiffs' experts, for their part, verified that "[a] lay person to the insurance industry cannot understand the underlying...scheme/fraud because of its complexity, and the substantial time and resources which would have to be expended to understand the scheme." While the experts provided some examples of each of the defendants' claim practices cited in the amended complaint, their explanations of how those "schemes" were fraudulent were decidedly less comprehensive. The experts attested that each individual provider

> has no way of knowing of the specifics of the scheme due to the overwhelming amount [*sic*] of documents the...provider receives from Triple-S on a monthly basis and because important information regarding the scheme is omitted from those documents. The time and resources needed to go through the documents would be overwhelming and a substantial hardship. Additionally, the documents received by the...provider, while not fraudulent on their face, are used in furtherance of the scheme for Triple-S to

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[4] The quoted language appears in identical form in each of the plaintiffs' declarations, including the typographical errors.

> obtain an economic benefit that it does not rightfully deserve.

The experts gave a similar account of the alleged scheme to defraud the subscribers, explaining that they "would have no way of knowing of [it] since part of this is reflected in the documents received by the [providers] of which the subscriber does not get copies."[5]

Based on these materials, the district court determined that the plaintiffs were advancing a new theory of mail and wire fraud: while they had asserted in response to the motion to dismiss that the transmissions from the defendants to the plaintiffs "misled them to believe that" they were paying the correct charge or receiving the correct payment, they were now arguing that those transmissions were "not fraudulent on their face." But the district court concluded that, under either theory, the plaintiffs could not survive summary judgment.

Treating the plaintiffs' new theory--that the defendants' transmissions violated the mail and wire fraud statutes because they failed to disclose the entirety of their schemes--as a proposed amendment to their complaint, the district court ruled that the plaintiffs had not alleged the underlying schemes with the particularity demanded by Fed. R. Civ. P. 9(b). The court further ruled that the plaintiffs were not entitled to further discovery before satisfying this pleading requirement. The district court also agreed with the defendants that the plaintiffs' original theory of mail and wire fraud and their claim of extortion had been fatally undermined

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[5] The substantive portions of each expert's declaration were identical to those of the other's.

by their deposition testimony. Accordingly, the court entered summary judgment for the defendants.

II.

The plaintiffs challenge the district court's decision on procedural and substantive grounds. First, they argue that the district court erred in entering summary judgment sua sponte before the plaintiffs had an opportunity to engage in discovery as to the merits of their claims. Second, the plaintiffs argue that even the limited evidence they were able to marshal at the time the court ordered summary judgment was sufficient to demonstrate genuine issues of material fact. We review these questions de novo. *See, e.g., John G. Alden, Inc. of Mass. v. John G. Alden Ins. Agency of Fla., Inc.*, 389 F.3d 21, 24 (1st Cir. 2004).

A.

A district court can enter summary judgment even though none of the parties asks for it. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Nevertheless, given the potential for unfairness lurking in this approach, we have ruled it out-of-bounds unless two separate conditions obtain. *See Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24, 29 (1st Cir. 1996). First, the discovery process "must be sufficiently advanced that the parties have enjoyed a reasonable opportunity to glean the material facts." *Id.* Second, the district court must provide "the targeted party appropriate notice and a chance to present its evidence on the essential elements of the claim or defense." *Id.*

The plaintiffs argue that the district court's course of action satisfied neither of these criteria, insisting that a district court cannot order summary judgment sua sponte unless and

until discovery has been completed. But we have never adopted such a hard and fast rule. To the contrary, we have determined that a district court properly considered summary judgment on its own initiative once "discovery had proceeded to the point where the parties understood the material facts" at issue. *Penobscot Indian Nation v. Key Bank of Me.*, 112 F.3d 538, 562 (1st Cir. 1997) (finding first condition satisfied where "parties had compiled a voluminous record that included depositions of all the parties involved" in event giving rise to claims); *see also Frederique-Alexandre v. Dep't of Natural & Envtl. Res.*, 478 F.3d 433, 438-39 (1st Cir. 2007) (reaching same conclusion where "discovery had proceeded to the point where [non-targeted party] was able to move for summary judgment" on relevant issue). We have even affirmed summary judgment entered sua sponte before any discovery had taken place, where the decision was based on legal conclusions independent of any potentially available evidence. *Bank v. Int'l Bus. Machs. Corp.*, 145 F.3d 420, 431 (1st Cir. 1998) (upholding sua sponte summary judgment on contract claim unsupportable in light of unambiguous language of agreement).

These decisions comport with the rule that sua sponte summary judgment must wait until "the parties have enjoyed a reasonable opportunity"--not necessarily the full duration of the discovery period--"to glean the material facts."[6] *Cf. Aetna*

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[6] *Levya v. On the Beach, Inc.*, 171 F.3d 717 (1st Cir. 1999), on which the plaintiffs rely, is not to the contrary. There, we noted that because the parties "disagree[d] about the status of pretrial discovery...it [was] unclear whether the first condition precedent to a sua sponte summary judgment was met." *Id.* at 720. Accordingly, we did not decide that issue, but reversed the entry of sua sponte summary judgment based on the district court's failure to satisfy the second condition, *i.e.*, adequate notice.

Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1568 (1st Cir. 1994) (drawing distinction between discovery being "merely 'sufficiently advanced'" and "complete" for purposes of sua sponte summary judgment). Of course, what amounts to a "reasonable opportunity" largely depends on the state of the particular litigation and the nature of the issue decided by the sua sponte summary judgment procedure. *Cf. Bank*, 145 F.3d at 431 (observing that district court could not have properly relied on extrinsic evidence in entering sua sponte summary judgment on contract claim before discovery commenced). Here, given the circumstances at hand, we conclude that the plaintiffs did have "a reasonable opportunity to glean the material facts" before the district court ordered summary judgment on its own initiative.

Our conclusion follows largely from the fact that the district court decided to consider sua sponte summary judgment against the plaintiffs based on what they said at their own depositions. After reviewing that testimony in detail, the court made the preliminary determination that the defendants' interactions with the plaintiffs did not amount to violations of the mail or wire fraud statutes or the Hobbs Act. The court then stuck by that determination after reviewing the plaintiffs' testimony a second time during its evaluation of their response to the show cause order. In this context, discovery obtained from the defendants could not have altered the outcome which, in the district court's view, was ordained by the plaintiffs' own deposition testimony.[7] *See Morales v. A.C. Orssleff's EFTF*, 246 F.3d 32, 33 (1st Cir. 2001) (noting propriety of summary judgment where plaintiff's deposition

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[7] As we discuss in Part B, *infra*, the district court was correct that the plaintiffs' deposition testimony failed to support their claims.

testimony "foreclosed any possibility of recovery from defendant").

Furthermore, by the time the plaintiffs were called upon to answer the show cause order, the discovery period had been running for nearly twelve months; during this time, the plaintiffs had taken the depositions of a number of Triple-S employees pursuant to Rule 30(b) (6) and procured voluminous documents and other written discovery responses. This discovery enabled the parties to file comprehensive briefing, together with numerous evidentiary materials, on the plaintiffs' motion for class certification. To support the motion, in fact, the plaintiffs asserted that the Rule 30(b) (6) "depositions established myriad examples of the uniformity and standardization of Defendants' practices that apply across the classes, namely in terms of pricing, standard communications, and automated systems that cover up the frauds the Plaintiffs allege or make them nearly impossible to detect." By even the plaintiffs' contemporaneous account, then, discovery was "sufficiently advanced that the parties ha[d] enjoyed a reasonable opportunity to glean the material facts" under consideration by the district court, *Berkovitz*, 89 F.3d at 29, namely, whether the "standard communications" supported the plaintiffs' claims.

The plaintiffs, however, maintain that they were not given the chance required by the first *Berkovitz* prong--nor, for that matter, the notice required by the second prong--because the district court entered summary judgment sua sponte before they could take the "merits discovery" permitted by the scheduling order. Seizing on our statement in *Berkovitz* that "[w]hen a court charts a procedural route, lawyers and litigants are entitled to rely on it," 89 F.3d at 30, the plaintiffs contend that the district court unfairly changed course by entertaining summary judgment in advance of the discovery

cutoff. As just discussed, though, *Berkovitz* does not demand the completion of discovery before the entry of sua sponte summary judgment no matter what.

Moreover, the scheduling order specifically contemplated both that "class certification discovery [would] in part overlap with merits discovery" and that the parties could file dispositive motions prior to the deadline for doing so, "if they underst[ood] that the issue(s) [were] ripe." So the plaintiffs could not reasonably have believed, based on the order, that they would under no circumstances have to oppose summary judgment prior to the completion of merits discovery. And, when the district court gave them ten working days to do so by issuing the order to show cause, the plaintiffs did not seek an extension of time to respond. Under these circumstances, the plaintiffs had "appropriate notice and a chance to present [their] evidence on the essential elements of the claim[s]" that the district court found insufficient in entering summary judgment.[8] *Berkovitz*, 89 F.3d at 29. The sua sponte nature of the summary judgment order was not error.

B.

The plaintiffs also question the substance of the summary judgment order. Summary judgment can enter "against a party who fails to make a showing sufficient to establish the

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[8] Again, *Levya* does not help the plaintiffs: there, we found the notice inadequate for sua sponte summary judgment in favor of individual defendants where the district court had previously announced that it would consider summary judgment against the corporate defendants only. 171 F.3d at 720. Here, in contrast, the district court specifically informed the plaintiffs that it was considering summary judgment against them, and the basis for its potential ruling, allowing them to address the issue.

existence of an element essential to that party's case, and on which that party will bear the ultimate burden of proof at trial." *Celotex*, 477 U.S. at 322. An essential element of the plaintiffs' case was mail and wire fraud, or extortion, which they characterized as the "pattern of racketeering activity" underlying their RICO claims. *See* 18 U.S.C. §§ 1961, 1962(a). The plaintiffs argue that their deposition testimony, together with their submissions in response to the show cause order, sufficed to create genuine issues of material fact as to whether the defendants had engaged in mail and wire fraud, as well as extortion. We consider the mail and wire fraud allegations first.

Mail or wire fraud requires proof of (1) a scheme to defraud based on false pretenses; (2) the defendant's knowing and willing participation in the scheme with the specific intent to defraud; and (3) the use of interstate mail or wire communications in furtherance of the scheme. *See, e.g., United States v. Cheal*, 389 F.3d 35, 41 (1st Cir. 2004); *Perez v. Volvo Car Corp.*, 247 F.3d 303, 312-13 (1st Cir. 2001). As we have recounted, the district court entered summary judgment against the plaintiffs on their mail and wire fraud claims because (1) their deposition testimony did not support the allegations of mail and wire fraud set forth in the amended complaint and (2) the materials submitted in response to the show cause order advanced a new theory of mail and wire fraud which, even if treated as a second amendment to the complaint, was not stated with the particularity required by Rule 9(b). The plaintiffs insist, however, that they "consistently alleged" the same theory of mail and wire fraud all along--that the defendants' transmissions "fail to disclose" or "conceal" how they process the plaintiffs' requests for payment--and that they had sufficient evidence to avoid summary judgment on that theory.

Taking the plaintiffs at their word that they did not shift theories in response to the show cause order,[9] we nevertheless believe that the district court properly entered summary judgment on the mail and wire fraud-based claims. A defendant's failure to disclose information, without more, cannot make out a violation of the mail and wire fraud statutes. *See, e.g.*, *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1065, (11th Cir. 2007); *United States v. Gray*, 405 F.3d 227, 235-36 (4th Cir. 2005); *United States v. Autuori*, 212 F.3d 105, 118 (2d Cir. 2000); *United States v. Cochran*, 109 F.3d 660, 665 (10th Cir. 1997); *Emery v. Am. Gen. Fin., Inc.*, 71 F.3d 1343, 1347 (7th Cir. 1995); *United States v. Kamer*, 781 F.2d 1380, 1386 (9th Cir. 1986). The authorities are less uniform on what "more" must be shown to transform a non-actionable nondisclosure into fraud in this context. Some courts have required a duty to disclose, triggered by an independent statutory scheme, the relationship between the parties, or the defendant's "partial or ambiguous statements that require further disclosure in order to avoid being misleading," *Autuori*, 212 F.3d at 119, while others have held that withholding information with the intent to deceive is enough, *see, e.g.*, *Gray*, 405 F.3d at 235-36; *Emery*, 71 F.3d at 1348.

We considered the issue in *Bonilla v. Volvo Car Corp.*, 150 F.3d 62 (1st Cir. 1998). There, we took the view that, without "a legal, professional or contractual duty" to disclose, the failure to do so generally cannot support a mail or wire fraud claim, though we acknowledged the existence of a "shadowy area" where nondisclosures in the absence of such

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[9] We therefore do not consider what the district court treated as the plaintiffs' "original" theory--that the communications from the defendants were facially "misleading."

a duty, if deliberate, could arguably "be treated as artifices to defraud under the federal statutes."[10] *Id.* at 70. We nevertheless observed that "[i]t would be a truly revolutionary change to make a criminal out of every salesman (assuming the use of the mails or telephone) who did not take the initiative to reveal negative information about the product and who--a jury might find--secretly harbored in his heart the hope that the buyer would never ask." *Id.*

For present purposes, however, we need not attempt to delineate the "shadowy area" where a failure to disclose, accompanied by the necessary intent, might transmogrify into a "scheme to defraud" under the mail and wire fraud statutes. Though the district court rejected the plaintiffs' fraud-by-nondisclosure theory on the ground that they had not alleged it with particularity, the plaintiffs make no effort to explain how their theory even states a claim predicated on mail and wire fraud. They do not say whether the defendants have a duty to disclose "the actual manner in which the payment requests were processed" or, if so, what the source of that duty is; they do not say whether the defendants "fail[ed] to disclose" or "conceal[ed]" this information with the intent to deceive the plaintiffs. Instead, they proceed on the assumption that nondisclosure alone can support mail and wire fraud claims. As we have discussed, that is not the law, in this circuit or elsewhere.

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[10] We expressed a similar view of the federal bank fraud statute, 18 U.S.C. § 1344 (2000), in *United States v. Moran*, 312 F.3d 480 (1st Cir. 2002). There, we noted that "federal bank fraud, consistent with its statutory purpose, extends to active concealment even in the absence of a fiduciary, statutory, or other independent legal duty of disclosure where the defendant acts with the requisite intent to mislead or deceive." *Id.* at 489 n. 10.

To excuse this shortcoming, the plaintiffs argue that they cannot explain how the defendants' actions amount to a "scheme to defraud" without further discovery, because "[t]he schematics of the fraudulent conduct are, as in many RICO enterprises, within the control of the Defendants." We agree with the district court that this argument is "paradigmatically antithetical to Rule 9(b)'s requirement." As we have held, "the rule does not permit a complainant to file suit first, and subsequently to search for a cause of action." *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985); *see also Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 42 (1st Cir. 1991) ("It is not enough for a plaintiff to file a RICO claim, chant the statutory mantra, and leave the identification of predicate acts to the time of trial."). The plaintiffs have taken this proscribed approach here: they have charged the defendants with schemes to defraud in violation of the mail and wire fraud statutes, yet maintain that "[i]t is impossible for a layman or a Plaintiff or class representative to articulate the specifics of [each] scheme/fraud." By way of these statements, made in the declarations the plaintiffs submitted in response to the show cause order, they have essentially conceded what the district court suspected--that they cannot personally provide any information about the alleged fraud.

The plaintiffs did, as they emphasize, submit declarations from two expert witnesses "to explain how the Defendant's [*sic*] practices form a RICO scheme," but, as the district court concluded, those declarations fall short of that objective. Each declaration provides examples of the defendants' various claim practices challenged by the amended complaint, followed by the conclusion that the defendants send the plaintiffs documents "in furtherance of the scheme for Triple-S to obtain an economic benefit that it does not rightfully

deserve."[11] The declarations do not explain, however, how any of these "schemes" equates with a "scheme to defraud" under the mail and wire fraud statutes--other than the statement that each individual plaintiff "would have no way of knowing of [the] scheme" and, again, simple nondisclosure does not mail or wire fraud make.

As the district court reasoned, the expert declarations (or even certain snippets of the plaintiffs' own deposition testimony) might have buttressed a theory that the defendants' claim practices violated the express or implied terms of their contracts with the plaintiffs, but "breach of contract itself [does not] constitute a scheme to defraud. Rather, the scheme must be intended to *deceive* another, by means of false or fraudulent pretenses, representations, promises, or other deceptive conduct." *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 791 (1st Cir. 1990) (citations omitted). Neither the experts' declarations--nor, by the plaintiffs' own admission, their own declarations or deposition testimony--so much as hint at such a scheme. Accordingly, "it is not simply details that [the plaintiffs] lack, but the substance of a RICO claim." *N. Bridge Assocs., Inc. v. Boldt*, 274 F.3d 38, 44 (1st Cir. 2001). The plaintiffs therefore had no right to further discovery to develop their ill-defined theory of mail

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[11] The plaintiffs argue that, if the district court had properly drawn all justifiable inferences from the evidence in their favor as required by the summary judgment standard, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986), these and like statements would have sufficed to demonstrate a genuine issue of material fact on their fraud-based claims. Given the statements' complete lack of specificity, we disagree. The purpose of summary judgment "is not to replace conclusory allegations of the complaint...with conclusory allegations of an affidavit." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

and wire fraud. *See id.*; *see also Ahmed v. Rosenblatt*, 118 F.3d 886, 889 (1st Cir. 1997). The district court correctly entered summary judgment for the defendants on the plaintiffs' fraud-based claims. *See Murr Plumbing, Inc. v. Scherer Bros. Fin. Servs. Co.*, 48 F.3d 1066, 1070 (8th Cir. 1995) ("A district court may enter summary judgment dismissing a complaint alleging fraud if the complaint fails to satisfy the requirements of Rule 9(b).").[12]

The plaintiffs also challenge the district court's entry of summary judgment on their claim premised on extortion in violation of the Hobbs Act. The Act outlaws extortion or attempted extortion affecting interstate commerce, *see, e.g.*, *United States v. Capozzi*, 347 F.3d 327, 335 (1st Cir. 2003), defining extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). In this context, "fear" includes "economic fear," but only if the fear is independently shown to be "wrongful," because "there is

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[12] The plaintiffs question the district court's ruling that they had not pleaded fraud with particularity after it had ruled to the contrary in denying, in part, the defendants' motion to dismiss. But, absent "a particularly egregious abuse of discretion," district courts are free to reconsider their interlocutory orders. *Harlow v. Children's Hosp.*, 432 F.3d 50, 55-56 (1st Cir. 2005). The plaintiffs make no effort to explain how the district court abused its discretion in deciding that the fraud-based claims in the amended complaint--once understood in light of the voluminous materials submitted on the motion for class certification and in response to the show cause order--were not pleaded with sufficient particularity. *See Murr Plumbing*, 48 F.3d at 1070 (upholding district court's dismissal of claims at summary judgment as deficient under Rule 9(b) despite its prior denial of motions to dismiss on that basis).

nothing inherently wrongful about the use of economic fear to obtain property," as opposed to the use of threatened force or violence to do so. *United States v. Sturm*, 870 F.2d 769, 772-73 (1st Cir. 1989). For this reason, "economic fear is wrongful under the Hobbs Act only if the plaintiff had a pre-existing statutory right to be free from the defendant's demand" for the property. *George Lussier Enters., Inc. v. Subaru of New Eng., Inc.*, 393 F.3d 36, 40 (1st Cir. 2004).

By way of recapitulation, the plaintiffs complained of extortion in the form of threats of exclusion from the network of insurance plans administered by the defendants, audits of the providers' accounts with the defendants, withholding of payments, and denial of patient referrals. But the district court, in deciding to issue the order to show cause, noted that most of the plaintiffs could not testify to receiving such threats and, even among those who could, none could claim that they rose to the level of "wrongful economic fear" prohibited by the Hobbs Act. When the plaintiffs' response failed to convince the district court otherwise, it entered summary judgment against them on the extortion-based claim.

On appeal, the plaintiffs do not rely on the testimony of those among them who recounted having actually been threatened.[13] We need not consider, then, whether the district

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[13] Nor do the plaintiffs make more than the most ephemeral reference to their claim that the defendants threatened economic harm through means besides audits, such as exclusion from the network or loss of patient referrals. Accordingly, while some of the plaintiffs stated in their declarations that they were forced to make unfavorable deals with the defendants to avoid these consequences, we do not consider any claim based on that aspect of the defendants' conduct. *See, e.g., Casillas-Diaz v. Palau*, 463 F.3d 77, 83 (1st Cir. 2006) ("'issues adverted to in a perfunctory

court was correct in classifying those threats as mere "lawful hard bargaining" rather than "wrongful economic fear" actionable as extortion. *George Lussier Enters.*, 393 F.3d at 51. Instead, the plaintiffs argue that they did not have to receive the alleged threats directly to experience extortion, which can result from "implicit" threats as well as explicit ones. We agree that a threat need not be explicit to be extortionate: under the appropriate circumstances, a rock thrown through a window can be just as effective as a threatening letter in convincing the victim to relinquish his property. This is the lesson of the cases, on which the plaintiffs heavily rely, that upheld extortion convictions based on implied threats. *See United States v. Lisinski*, 728 F.2d 887, 889-92 (7th Cir. 1984) (affirming conviction of defendant who "preyed upon or exploited" restauranteur's fear that he would lose liquor license, even though defendant never expressly threatened that result); *United States v. Glasser*, 443 F.2d 994, 1007 (2d Cir. 1971) (affirming conviction of unionized window installers for throwing acid on windows installed by nonunionized counterparts).

To succeed on their RICO claim based on the alleged Hobbs Act violations, however, the plaintiffs must show not only that extortion occurred, but that "they suffered a direct injury as a result of [it]." *George Lussier Enters.*, 393 F.3d at 51. The plaintiffs do not point us to anything in their deposition testimony or declarations suggesting that they did.[14] Instead, they rely solely on their experts' declarations

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manner, unaccompanied by some effort at developed argumentation, are deemed waived'" (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990))).

[14] The plaintiffs do refer to the testimony of one of the physicians among them, arguing that the district court erroneously concluded

that "Defendants use their audit practices in an abusive manner as a means of forcing the providers to accept unilateral changes to the contract and inhibiting questions or complaints from those providers regarding their practices." But this statement, even taken at face value, does not suggest that any of the plaintiffs themselves ever acquiesced to these demands. The plaintiffs cannot press a RICO claim based on attempts at extortion that did not succeed in harming them. *See Camelio v. Am. Fed'n*, 137 F.3d 666, 670-71 (1st Cir. 1998). The plaintiffs have not shown that the district court erroneously entered summary judgment on their RICO claim predicated on the defendants' alleged violations of the Hobbs Act.

III.

For the foregoing reasons, we **affirm** the district court's entry of summary judgment for the defendants.

So ordered.

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that she was never threatened with an audit when she had stated in her deposition only that she had never been audited. In fact, the plaintiffs argue, this physician had been threatened with an audit, as she attested in her subsequent declaration. The declaration does not, however, state that the physician ever gave up any rights as a result of the claimed threat and therefore does not cure the deficiency in the plaintiffs' extortion based claim.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 06-1925

[Filed June 13, 2007]

JOSE SANCHEZ;	)
NILSA IRIZARRY;	)
CONJUGAL PARTNERSHIP	)
SANCHEZ-IRIZARRY,	)
d/b/a, Laboratorio Clinico Irizarry Guash;	)
DELMA RODRIGUEZ;	)
WILMER ROLDAN;	)
CONJUGAL PARTNERSHIP	)
ROLDAN-RODRIGUEZ,	)
d/b/a Laboratorio Salimar;	)
MAITE ROLON-BALSEIRO;	)
CESAR DEL-VALLE-VAGUE;	)
CONJUGAL PARTNERSHIP	)
DEL-VALLE-ROLON,	)
d/b/a Laboratorio Clinico Rolon;	)
OIM ENTERPRISES, INC.,	)
d/b/a Laboratorio Clinico Ramos;	)
ELBA RIVERA-MARTINEZ;	)
CONJUGAL PARTNERSHIP	)
MELENDEZ-RIVERA;	)
JOSE ZAYAS;	)
ANA HERNANDEZ-RIVERA;	)

CONJUGAL PARTNERSHIP)
ZAYAS-HERNANDEZ;)
FRANCES GUTIERREZ-MARTINEZ;)
CONJUGAL PARTNERSHIP)
GARRATON-GUTIERR;)
NESTOR ALLENDE-ORTIZ;)
ROSA ASPARO-PLANA;)
CONJUGAL PARTNERSHIP;)
ALLENDE-ASPARO;)
MEDICAL GERIATRICS AND)
ADMINISTRATIVE SERVICES, INC.;)
OUTPATIENT ADMINISTRATIVE)
SERVICES, INC.;)
JOSE E. VARELA-ROSARIO;)
MIGDALIA QUILES-RODRIGUEZ;)
CONJUGAL PARTNERSHIP)
VARELA-QUILES,)
d/b/a Farmacia San José,)
d/b/a Farmacia De Aqui;)
ANA DELIA MARRERO;)
CONJUGAL PARTNERSHIP)
TORRES-MARRERO,)
d/b/a Farmacia San Antonio;)
ALICIA FELIBERTI-IRIZARRY;)
GUILLERMO J. FERNANDEZ;)
ELIZABETH SANCHEZ DE LEON;)
CONJUGAL PARTNERSHIP)
RUIZ-SANCHEZ,)
LYDIA AYALA-DIAZ;)
JULIA NAVEIRA;)
CONJUGAL PARTNERSHIP;)
VAZQUEZ-NAVEIRA;)
LUIS CARMELO ALAMO CRUZ;)
CONJUGAL PARTNERHSIP)
ALAMO-CRUZ;)

JOSE WILLIAM VAZQUEZ;)
ISOLINA RUIZ;)
JOSE VEGA;)
CONJUGAL PARTNERSHIPVEGA-RUIZ;)
FRANCES MATOS-ORTIZ;)
WILFREDO BURGOS SANTIAGO;)
CONJUGAL PARTNERSHIP)
BURGOS-MATOS;)
JOREALIS VIGO-GONZALEZ;)
AYMETTE VIGO-GONZALEZ;)
LENDIS OJEDA-ALEMANY;)
KARLA OJEDA-ALEMANY;)
DANIEL AQUINO RIVERA;)
DORIS MIRANDA RAMOS;)
CONJUGAL PARTNERSHIP)
AQUINO-MIRANDA;)
ALEJANDRA OJEDA-ALEMANY;)
DANIERIC AQUINO-MIRANDA;)
DARRYL AQUINO-MIRANDA;)
EDGARDO RODRIGUEZ-MARRERO;)
ROY BROWN;)
SAMMY GARAU-DIAZ;)
KETTY DIAZ-GARCIA;)
AEDNA MARTINEZ-LAZU;)
ANDRES ROMERO-DEST;)
ANA I. RODRIGUEZ-MARRERO;)
DAISY MORALES-PEREZ;)
CARMEN ORTIZ-ROQUE)
Plaintiffs, Appellants,)
)
v.)
)
TRIPLE-S MANAGEMENT, CORP.;)
TRIPLE-S, INC.;)
SEGUROS TRIPLE S, INC.;)

SEGUROS DE VIDA)
TRIPLE-S, INC., SSS;)
INTERACTIVE SYSTEMS, INC.;)
TRIPLE-C, INC.;)
ACCESSO-SALUD, INC.;)
MC-21 CORPORATION;)
CPA RAMON M. RUIZ-COMAS;)
MIGUEL VAZQUEZ-DEYNES;)
CRISPULO RIVERA-OFRAY;)
MD BELISARIO MATTA;)
MD FERNANDO L. LONGO;)
MD WILMER RODRIGUEZ-SILVA;)
MD FERNANDO YSERN-BORRAS;)
MD EMIGDIO BUONOMO;)
MD ANGEL W. HERNANDEZ-COLON,)
Defendants, Appellees.)
)

JUDGMENT

Entered: June 13,2007

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's entry of summary judgment for the defendants is affirmed.

By the Court:

Richard Cushing Donovan, Clerk

[cc: Ms. Durand, mr. Quetglas-Jordan, Mr. Torres-Moncada, Mr. Hulsey, Mr. Quinones, Mr. Cook, Ms. Jenkins, Mr. Blakey, Mr. Mahony, Mr. Kosto, Mr. Ramirez-Coll, Mr. Alcover-Acosta, Mr. Antonetti Zequeira, Mr. Quinones-Rivera, Mr. Zayas-Marxuach, Mr. Cartagena-Santiago, Mr. Dapena, Mr. Colberg, Mr. Cobian Guzman, Mr. Cobian-Roig, Mr. Sanchez-Betances, Mr. Sifre Rodriguez, Mr. Valls Sanchez, Mr. Tulla, & Mr. Bague Soto.]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civil No. 03-1967 (JAF)

[Filed May 5, 2006]

JOSE SANCHEZ, et al.,
Plaintiffs,

v.

TRIPLE-S MANAGEMENT CORPORATION, et al.,
Defendants.

OPINION AND ORDER

Plaintiffs, José Sánchez, Nilsa Irizarry, and their conjugal partnership, d/b/a "Laboratorio Clínico Irizarry Guash"; Delma Rodríguez, Wilmer Roldán, and their conjugal partnership, d/b/a "Laboratorio Salimar"; Maite Rolón Balseiro, César del Valle Vague, and their conjugal partnership, d/b/a "Laboratorio Clínico Rolón"; Oim Enterprises, Inc., d/b/a "Laboratorio Clínico Ramos"; Héctor Meléndez Mojica, Elba Rivera Martínez, and their conjugal partnership; José Zayas, Ana Hernández Rivera, and their conjugal partnership; Miguel Garratón, Frances Gutiérrez Martínez, and their conjugal partnership; Néstor Allende

Ortiz, Rosa Asparo Plana, and their conjugal partnership; Medical Geriatrics and Administrative Services, Inc.; Outpatient Administrative Services, Inc.; José E. Varela Rosario, Migdalia Quiles Rodríguez, and their conjugal partnership, d/b/a "Farmacia San José" and d/b/a "Farmacia de Aquí"; José A. Torres, Ana Delia Marrero, and their conjugal partnership, d/b/a "Farmacia San Antonio"; Alicia Feliberti-Irizarry; Guillermo J. Fernández; Rodolfo Ruiz Brignoni; Lydia Ayala Díaz; José William Vázquez; Pablo Rivera Mercado; Isolina Ruiz and José Vega, and their conjugal partnership; Frances Matos Ortiz; Jorealis González and Aymette Vigo González; Lendis, Karla Alemañy and Alejandra Ojeda Alemañy; Danieric Miranda and Darryl Aquino Miranda, and their conjugal partnership; Frances Matos Ortiz; Lydia Ayala Díaz; Edgardo Rodríguez Marrero; Roy Brown; Dr. Sammy Garau Díaz; Ketty Díaz García; Aedna Martínez Lazú; Andrés Romero Dest; and Ana I. Rodríguez Marrero bring the present class action against Defendants, Triple-S Management Corporation, Triple-S, Inc.; Seguros Triple-S, Inc.; Interactive Systems, Inc.; Triple-C, Inc.; Accessso-Salud, Inc.; MC21 Corporation; Ramón M. Ruiz Comas, Miguel Vázquez-Deynes; Dr. Críspulo Rivera Ofray; Dr. Belisario Matta; Dr. Fernando L. Longo; Dr. Wilmer Rodríguez Silva; Dr. Fernando Ysern-Borrás; Dr. Emigdio Buonomo; Dr. Angel Hernández Colón; and the conjugal partnerships composed by each individual defendant and their respective spouses, asserting claims under the Racketeer Influenced and Corrupt Organization Act ("RICO"), as amended, 18 U.S.C. § 1962 (2000 & Supp. 2004). Plaintiffs invoke this court's federal question jurisdiction under 28 U.S.C. § 1331 and 18 U.S.C. § 1964 (2001 & Supp. 2004). Plaintiffs seek monetary and equitable remedies under RICO based on their allegations of Defendant's fraudulent activities. *Docket Document Nos. 117* (amended complaint).

I.

Procedural Synopsis

Plaintiffs allege that an enterprise composed by an association of Defendants and other named and unnamed parties, engaged in a fraudulent scheme to wrongfully overcharge and underpay Plaintiff Providers and Subscribers through a pattern of mail and wire fraud and extortion. *Docket Document No. 117.*

On March 7, 2005, we denied in part and granted in part Defendants' motion to dismiss. *Docket Document No. 115.* The following counts of the complaint survived Defendants' motion to dismiss: Count IV, alleging that Defendants schemed to fraudulently overcharge Triple-S subscribers for service co-payments and insurance premiums; Count VI, alleging that Defendants schemed to systematically deny and diminish payments due to network providers for services rendered to subscribers; Count VII, alleging that Defendants schemed to use Triple-S's market dominance and economic power to extort money and dissuade opposition of Defendants' fraudulent practices; and Count VIII, alleging that Defendant MC-21 denied payments and wrongfully charged network pharmacies and pharmacy consumers for drugs that should have been covered under insurance contract agreements. *Docket Document No. 117.* Counts VI, VI, and VIII were predicated on mail and wire fraud statute violations, 18 U.S.C. §§ 1341 and 1342 (2000 & Supp. 2004); Count VII was predicated on Hobbs Act violations. 18 U.S.C. § 1951 (2000 & Supp. 2004).

After conducting limited class-certification discovery, Plaintiffs moved for class certification on November 30, 2005. *Docket Document No. 149.* Defendants moved to

compel arbitration on December 14, 2005. *Docket Document No. 158.*

On March 17, 2006, without deciding either pending motion but on the basis of arguments put forward by Defendants in opposition to class certification, we ordered Plaintiffs to show cause as to why summary judgment should not be awarded against them. *Docket Document No. 202.* Our order was prompted by a concern that the limited class-certification discovery conducted by the parties strongly suggested that Plaintiffs can under no circumstances support the allegations sustaining this entire litigation: namely, that Defendants transmitted mail and wire communications in furtherance of a fraudulent scheme, in violation of the mail and wire fraud statutes, and extorted Plaintiffs in violation of the Hobbs Act. 18 U.S.C. §§ 1341, 1342, 1951.

In their compliance motion and sur-reply, Plaintiffs hotly contest the propriety of our order, and also attempt to demonstrate the existence of genuinely contested material facts sufficient to sustain this lawsuit. *Docket Document Nos. 205, 217.* Defendants oppose, eagerly supplying additional fodder in support of dismissal. *Docket Document No. 209.* For the reasons stated herein, we find that Plaintiffs are plainly incapable of putting forth the evidence necessary to sustain a RICO action predicated on either the mail and wire fraud statutes or the Hobbs Act, and so we grant summary judgment in Defendants' favor.

II.

Standards and Propriety

The standard for summary judgment is straightforward and well-established. A district court should grant summary

judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(C). A factual dispute is "genuine" if it could be resolved in favor of either party, and "material" if it potentially affects the outcome of the case. *Calero-Cerezo v. U.S. Dep't of Justice*, 355 F.3d 6, 19 (1st Cir. 2004).

We are "widely acknowledged to possess the power to enter summary judgment[] *sua sponte*," *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986), so long as we have given Plaintiffs "appropriate notice and a chance to present [their] evidence on the essential elements of the case..." *Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24, 29 (1st Cir. 1996). Although we clearly put Plaintiffs on notice through our order to show cause, *Docket Document No. 202*, Plaintiffs contend that we should not have done so before they have had an opportunity to engage in discovery on the case's merits. We disagree.

In the course of conducting extensive class-certification discovery, the parties have touched upon issues that bear directly on the case's merits, which, itself, is quite common. "[T]he class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Coopers & Lybrand v. Livesday*, 437 U.S. 463, 469 (1978) (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). However, class-certification discovery in this case revealed with unusual clarity that Plaintiffs' claims are insufficient to support a cause of action. In subtle but fatefully important ways, Plaintiffs' claims as they have been revealed in recent pleadings and in deposition testimony differ and are inferior

to the allegations in Counts IV and VI-VIII of the complaint, the only counts which were adequate to survive Defendants' motion to dismiss. *Docket Document No. 115.* The materials available to us now show unequivocally that Defendants did not engage in either mail and wire fraud or extortion in their dealings with Plaintiffs– both quintessentially "essential elements" to Plaintiffs' case. *Berkovitz*, 89 F.3d at 29. Although the parties have not engaged in full-scale discovery, this litigation is "sufficiently advanced" to justify summary judgment in that there are no facts that Plaintiffs could conceivably uncover– or, at least, none consistent with the record before us– so impressive as to remedy the case's deficiencies. *Bank v. Int'l Business Machines Corp.*, 145 F.3d 420, 431 (1st Cir. 1998); *see also Diaz v. City of Fitchburg*, 176 F.3d 560, 562 n.2 (district court was justified in granting suasponte summary judgment because essential issue was a "question of law which does not depend on the development of further facts."). For this reason, we are justified in granting summary judgment sua sponte before the conclusion of discovery. Summary judgment exists "to pierce the boilerplate of the pleadings and assess the proof in order to determine the need for trial." *Euromodas, Inc. v. Zanella*, 368 F.3d 11, 17 (1st Cir. 2004) (citing *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 794 (1st Cir. 1992)). We issued an order to show cause and are now awarding summary judgment because of our belief that Plaintiffs cannot "establish the existence of an element essential to [their] case": that Defendants committed the RICO predicates of either mail and wire fraud or extortion. *Celotex*, 477 U.S. at 322; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)(When faced with summary judgment, "the plaintiff [can] not rest on his allegations...to get to a jury without 'any significant probative evidence tending to support the complaint.'")(quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)).

III.

Analysis

A. Mail and Wire Fraud: Counts IV, VI & VIII

The record before us clearly indicates that Plaintiffs' allegations of mail and wire fraud are unsupportable. Plaintiffs now concede that the mails and wires referenced in the complaint "could be innocent" in the sense that they are "true" and contain no misstatements or lies. *Docket Document No. 205*. Plaintiffs argue that the mail and wire fraud statutes are nonetheless implicated because the mails and wires facilitated Defendants' fraudulent scheme, which is so concealed that Plaintiffs are unable to conjecture as to its nature without first engaging in merits discovery. *Id.*

Plaintiffs' current posture stands in marked contrast to the position they convincingly took when arguing against Defendants' motion to dismiss: the content of the communications misled providers to believe they were being paid the correct tariffs and subscribers to believe they were being charged the correct co-payments. *Docket Document No. 95, Exh. C.*

We will proceed by first demonstrating how the class certification discovery materials reveal the original allegations to be unsupportable; and second, explaining how Plaintiffs' new and revised narrative as to how Defendants committed mail and wire fraud– a narrative that is at least consistent with the factual record– is insufficiently particularized to withstand Rule 9(b) scrutiny.

1. Class Discovery Materials Render Allegations Unsupportable

As we discussed in detail in the order to show cause, our review of class certification discovery materials suggested that the mails and wires Plaintiffs' received suffer from two deficiencies: (1) they differ materially from how they were described in the complaint; and (2) more critically, they cannot be considered as having been transmitted in furtherance of a fraudulent scheme, as the concept is legally defined.[1] *Docket Document No. 202.*

a. Original Pleadings

In their complaint, Plaintiffs allege that "for the purpose of executing and concealing the artifice" through which Defendants schemed to fraudulently overcharge and underpay the various Plaintiff classes, Defendants violated the mail and wire fraud statutes by commissioning hundreds of thousands of "requests for authorization, letters, contracts, bills, payments, [and] receipts," as well as "letters containing the new tariffs and billing policy, accounting statements, accounting records" and "drug prescriptions." *Docket Document No. 117, ¶¶ 131, 170, 219.*

Our review of Defendants' motion to dismiss required us to contemplate "how FED. R. CIV. P. 9(B)'s special pleading

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[1] Plaintiffs are correct in pointing out that some language in our order incorrectly expressed the standard by which mail and wire fraud is to be plead: the communications themselves need not be fraudulent, and injury need not arise directly through receipt of the communications. *Docket Document No. 205.* Nevertheless, as we discuss in detail herein, the concerns raised in our order are equally valid according to the proper standards.

requirement interacts with mail and wire fraud allegations under RICO," a thorny issue upon which the First Circuit has fortunately expounded. *New England Data Services, Inc. v. Becher*, F.2d 286, 288 (1st Cir. 1987). The circuit court required RICO mail and wire fraud allegations to be plead with a degree of specificity "no more or less than we have required in general fraud and securities fraud cases," but discouraged lower courts from automatically dismissing deficient complaints when "the specific allegations of the plaintiff make it likely that the defendant used interstate mail or telecommunications facilities, and the specific information as to use is likely in the exclusive control of the defendant." 829 F.2d at 289-290. The *Becher* court instead suggested that lower courts provide plaintiffs the opportunity to amend their complaint after preliminary discovery.[2] *Id.*

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[2] Courts have not interpreted *Becher* so loosely as to give plaintiffs an automatic right to discovery before shouldering their burden to plead with Rule 9(b) particularity. Rather, preliminary discovery is only allowed when the complaint asserts that specific details are in defendants' exclusive control. *See N. Bridge Assoc., Inc. v. Boldt*, 274 F.3d 38, 43-44 (1st Cir. 2001)(finding that "district court was not obliged to give [plaintiffs] a second chance" to construct a RICO claim after engaging in preliminary discovery because "complaint does not present 'specific allegations' of...mail or wire fraud episodes whose details could be expected to be exclusively within the defendants' knowledge."); *Ahmed v. Rosenblatt*, 118 F.3d 886, 889-90 (1st Cir. 1997)(noting that application of *Becher* "second determination" approach is "neither automatic, nor of right, for every plaintiff"). *Becher* therefore in no way lessens the strength of the rule that it "is not enough for a plaintiff to file a RICO claim, chant the statutory mantra, and leave the identification of predicate acts to the time of trial." *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 42-43 (1st Cir. 1991).

Mindful of Rule 9(b)'s pleading requirements, Plaintiffs attached an exhibit to their response to Defendants' motion to dismiss dedicated entirely to explaining how the mail and wire fraud allegations were sufficiently particularized. *Docket Document No. 95, Exh. C.* As to the content of the communications for Counts IV and VI, Plaintiffs alleged: "At all times through their communications with the plaintiff classes the defendants misled them to believe that SSS was charging [Plaintiff Subscribers] the correct premium or tariff...[and] paying [Plaintiff Providers] the correct tariffs...." *Id.* Plaintiffs' amended Count VIII put forward specific examples of mail and wire fraud, including: (1) Defendant MC-21's insurance claim rejection letters that were transmitted to the Plaintiff pharmacy owner sub-class; (2) reimbursement checks that were improperly discounted; (3) coercive circulars requiring contract acceptance and detailing compensation plans; and (4) circulars declaring Defendant MC-21's intention to cover only generic drugs. *Docket Document No. 117, ¶ 222.*

We denied in part Defendants' motion to dismiss, concluding that the complaint satisfied Rule 9(b)'s particularity requirement. *Docket Document Nos. 115, 119.* In finding the mail and wire fraud allegations adequate, we interpreted them as asserting that mailings were sent "for the purpose of executing [the fraudulent] scheme." 18 U.S.C. § 1341; *see also Amrack Prods., Inc. v. Morton*, 410 F.3d 69, 72 (1st Cir. 2005)(factual allegations are accepted as true and all reasonable inferences are drawn in plaintiffs' favor); *United States v. Serino*, F.2d 924, 928 (1st Cir. 1987)(noting that First Circuit, in accord with other courts, has "given a liberal construction" to mail fraud statute's language).

b. Class Certification Discovery Materials

Class certification discovery, though intentionally limited in scope, has made crystal clear that mail and wire fraud were not used in furtherance of the scheme, even if such an elusive scheme exists. The mails and wires that Plaintiffs received as they were described in deposition are the exact opposite of what they were represented to be in the complaint, and fall on the very opposite side of the line delineated in *United States v. Pacheco-Ortiz*, 889 F.2d 301, 305 (1st Cir. 1989), in which the First Circuit announced how to determine whether a particular mail or wire transmission was in furtherance of a fraudulent scheme:

> Within the mail fraud statute as furthering the illegal scheme are those mailings that: assist the criminal in carrying out the fraud; or delay discovery of the fraud....[O]utside the statute as not furthering the illegal scheme are those mailings that: serve to put the defrauded party on notice regarding the fraud; make the execution of the fraud less likely; oppose the scheme; or disclose the nature of the fraud.

889 F.2d at 305 (quoting *United States v. Leyden*, 842 F.2d 1026, 1028-1030 (8th Cir. 1988)).

When Plaintiffs claimed, in opposing Defendants' motion to dismiss, that their fraud allegations were particularized, they pointed specifically to EOBs, EOPs, and other communications that allegedly "misled" them into believing they were receiving the correct payments and benefits from Triple-S. *Docket Document Nos. 95, 117.* Now, not one of the twelve deponents in this case can recall receiving a mail or wire that they can plausibly describe as misleading, instrumental in defrauding them, or even that "conceal[ed]...

the actual manner in which payments [or benefits] were processed," as alleged in the complaint. *Docket Document No. 117.*

Instead, these communications were the very catalyst through which Plaintiffs became apprised of the allegedly fraudulent scheme. Time and again, in deposition, Plaintiffs admitted that the communications explained how a particular "payment was going to be lowered" and exactly "what was going to happen to [a] claim." *Docket Document No. 157, Exh. 6, pp. 84-85.* There was "no secret": the EOPs contained "nothing hidden" or "concealed." *Id., Exh. 8, pp. 37, 68, 84-85.* Plaintiffs "noticed" Defendants' objectionable practices "through the EOPs" themselves. *Id., p. 68.* Defendants clearly disclosed how and what they were charging in relation to the claim submission process for Plaintiff Pharmacists. *Docket Document No. 183, p. 224.* "The information [Defendants] gave in the circular letters" alerted Plaintiffs to the allegedly fraudulent behavior. *Docket Document No. 157, Exh. 13, p. 48.* Documents received by Plaintiff Subscribers included "[EOBs] describing the procedures performed and what services had been covered in a time period" and "letters...informing of any changes in the coverage or other pertinent information." *Docket Document No. 205, Exh. 3, ¶ 3.* EOPs received by Plaintiff Providers "include reports of denied claims...[and] reimbursement checks." *Id., Exh. 11, ¶ 12.* Monthly statements for capitation providers "showed all charges charged against the capitation including inappropriate charges." *Id., Exh. 6, ¶ 4.*

Further discovery cannot aid Plaintiffs' cause. Because the allegations clearly asserted that the communications mailed and wired in furtherance of the fraudulent scheme were transmitted directly to Plaintiffs, *Becher's* "second determination" approach is not and never has been available

here; any communications transmitted in furtherance of a fraud scheme necessarily must be (or must have been) in Plaintiffs' possession. *Ahmed*, 118 F.3d at 889-90. As Plaintiffs were not entitled to preliminary discovery before satisfying Rule 9(b)'s pleading requirements, the case's viability moving forward depends on the original allegations' continued resistance to at least the mildest scrutiny. Plaintiffs now contradict those allegations, and so there is no legal basis through which they can lay claim to continued discovery. They are empty-handed.

2. **Plaintiffs' New Characterization of the Mail & Wire Fraud Allegations**

Plaintiffs now freely admit that the EOPs, EOBs, circulars, and remittances referenced in the complaint and in opposition to Defendants' motion to dismiss did not contain any misleading information, and in fact alerted Plaintiff Providers as to the possibility that they were not getting paid to the extent they feel entitled. *Docket Document No. 205* (conceding that "there is nothing inherently false" in the transmissions); *see also Id., Exh. 1, ¶ 26* ("the documents received [are] not fraudulent on their face"). Plaintiffs' new position is that the mail and wire communications were not necessarily misleading, but nevertheless were sent in furtherance of fraudulent scheme, therefore implicating the mail and wire fraud statutes. *Id.*

While "no misrepresentation of fact is required in order to establish a scheme to defraud...not every use of the mails or wires in furtherance of an unlawful scheme to deprive another of property constitutes mail or wire fraud." *McEvoy Travel Bureau, Inc.v. Heritage Travel, Inc.*, 904 F.2d 786, 791 (1st Cir. 1990). In order to stick, mail and wire fraud allegations must at least "assist the criminal in carrying out

the fraud...or delay discovery of the fraud." *Pacheco-Ortiz*. 889 F.2d at 305. A mailing "need not be...connected with the essence of the fraud...so long as it is 'incident to an essential element of the fraud.'" *United States v. Pimental*, 380 F.3d 575, 587 (1st Cir. 2004)(quoting *Schmuck v. United States*, 489 U.S. 705, 715 (1989)); *see also Serino*, 835 F.2d at 928-29 ("As long as the mailings are sufficiently related to the scheme so that the execution of the scheme depended on those mailings being sent, the proper nexus is established."). Since Plaintiffs no longer aver that the mails and wires were, themselves, misleading, their new position could be tenable only if accompanied by a particularized description of the scheme and how the communications, though facially innocent, furthered the scheme. *See Murr Plumbing, Inc. v. Scherer Bros. Fin. Servs. Co.*, 48 F.3d 1066, 1070 n.6 (8th Cir. 1995)("In a case of mail or wire fraud that does not involve a misrepresentation of fact, the circumstances [that must be stated with particularity]...consist of four elements: (1) a scheme to defraud; (2) intent to defraud; (3) reasonable foreseeability that the mails (or wires) would be used; and (4) use of the mails (or wires) in furtherance of the scheme."). Plaintiffs' new characterization of the complaint must fail because it is unsuccessful in describing either the scheme or how the mails were used in furtherance of the scheme.

a. <u>The Scheme</u>

Plaintiffs' underlying motivation in bringing this case is that they detest the way in which Defendants Triple-S and MC-21 calculate provider payments and subscriber benefits, and allege that the manner in which providers are consistently underpaid and subscribers underserved amounts to a scheme to defraud. *Docket Document Nos. 95, 117, 149, 205*. But Plaintiffs have been demure in describing anything useful about the fraudulent scheme: how it functions, why it is

fraudulent, or what makes it a scheme. Instead, they broadly assert that "[a] lay person...cannot understand the underlying Triple S/MC-21 scheme to defraud because of its complexity." *Docket Document No. 205.* Even according to Plaintiffs' experts, who have been proffered for the very purpose of testifying to the scheme's nature, "there is no way to know the specifics of the scheme." *Id.* In the final analysis, the scheme is something that Plaintiffs merely "reasonably suspect but cannot prove until merits discovery." *Id.* This description is paradigmatically antithetical to Rule 9(b)'s requirement that "[i]n all averments of fraud...the circumstances constituting fraud...shall be stated with particularity."

b. Mails and Wires Used in Furtherance of the Scheme

In response to our order to show cause, Plaintiffs enumerate the ways in which mail and wire communications were used in furtherance of a scheme to defraud:

> Plaintiffs have received...Explanation of Benefits ("EOBs") [and, in Plaintiff Providers' case, Explanation of Payments ("EOPs")] and letters informing Plaintiffs of changes in coverage [and payment policy]....claim remittance forms....monthly capitation statement[s] which showed all charges against the capitation including the inappropriate [deductions]....[M]onthly statements [and checks] reimbursing the inappropriate charges made to the capitation in previous months...routine transmission...of approval or denial of [sic] catastrophic injuries...transmissions by which...claims are processed and which detail how Triple-S improperly denies claims....[C]ircular letters

> concerning additions or deletions of CPT codes, formularies, or payment policies....Provider Manuals.

Docket Document No. 205. As explained by the named Plaintiffs who received them, and understood in a light most favorable to Plaintiffs' cause, the communications simply do not fit the bill for mail or wire fraud because they did not fraudulently induce Plaintiffs, but instead tipped them off to the possibility that Triple-S was short-changing them.

Plaintiffs' experts now assert that "important information regarding the scheme is omitted from these documents," then quickly qualify this vague aspersion by stating that "the time and resources needed to go through these documents would be overwhelming and a substantial hardship." *Id., Exhs. 1, ¶ 38; 2, ¶ 38.* This allegation is echoed in Plaintiffs' sur-reply to the order to show cause, in which they aver that the EOPs "do not disclose the process by which Defendants arrive at their decisions." *Docket Document No. 217.* In the absence of a clear depiction of the scheme, this averment is useless in helping us understand the communications' relation to the fraud.

Plaintiffs could be construed as alleging that Defendants have breached their agreements with Plaintiff Providers and Subscribers. *Docket Document No. 205, Exh. 1, ¶ 10* ("Triple-S pays...a lower rate than the contract rate agreed upon in the contract."). But in the absence of some "calculated misstatement or perversion of truth, trickery, or other deception" in the mails or wires, breach of contract, in itself, does not constitute mail or wire fraud even if mails and wires were used in implementing the contract breach. *Id.* (citing *United States v. Kreimer*, 609 F.2d 126, 128 (5th Cir. 1980)("[T]he [mail and wire fraud] statute[s] do[] not reject all business practices that do not fulfill expectations, nor do[]

[they] taint every breach of a business contract."); WEBSTERS THIRD INTERNATIONAL DICTIONARY (defining "fraud"). The allegation that the EOPs "do not disclose the process by which Defendants arrive at their decisions" is so vague and uninstructive that it simply does not support a claim for an omission triggering the mail and wire fraud statutes. *Docket Document No. 217.* Similarly unavailing are Plaintiffs' allegations that Defendants arbitrarily: (1) denied drug and procedure claims; (2) imposed excessive waiting periods for approving special coverages and stop loss claims for IPAs; and (3) arbitrarily deprived IPAs of capitation payments and laboratories of test reimbursements; because Plaintiffs are unable to describe how the mails and wires furthered the scheme, the mail and wire fraud statutes are not successfully invoked. *Docket Document No. 205, Exh. 1,* ¶ *22.*

c. **Our Disposition of Plaintiffs' New Approach**

Plaintiffs' new characterization of the complaint allows us to understand it as alleging: "(1) A fraudulent scheme exists and (2) mails and wires were used to facilitate the scheme. Even though (3) the mails and wires themselves did not contain any falsities or deceptions, (4) they must have been misleading because (5) they did not reveal the true nature of the scheme, (6) the nature of which will become clearer at a later date." Accepting Plaintiffs' assurances that the mails and wires must have been misleading because they conceal the fraudulent scheme would require us to take an unacceptable leap of faith in taking their word that a fraudulent scheme exists. *See Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985)("[I]n cases in which fraud lies at the core of the action, the rule does not permit a complainant to file suit first, and subsequently search for a cause of action.").

Therefore, even if were to accept Plaintiffs' new approach as an amended complaint, we would be justified in dismissing it immediately as totally non-responsive to the applicable pleading requirements. *See Murr Plumbing*, 48 F.3d at 1070.("A district court may enter summary judgment dismissing a complaint alleging fraud if the complaint fails to satisfy the requirements of Rule 9(b)."). Whether the communications in question were mails and wires sent in furtherance of a scheme to defraud is "a question of law which does not depend on the development of further facts." *Diaz*, 176 F.3d at 562 n.2.

Accordingly, summary judgment is granted in Defendants' favor as to Counts IV, VI, and VIII.

B. <u>Hobbs Act - Extortion</u>

Count VII is predicated on the Hobbs Act, which defines extortion as "the obtaining of property of another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official light." 18 U.S.C. § 1951. Plaintiffs insist that Defendants schemed to extort them by subjecting them to fear of economic loss, threatening them with: (1) exclusion from the health plan networks administered by Triple-S; (2) discriminatory audits under manipulative accounting procedures; (3) payment withholdings justified by the manipulated audit results; and (4) denial of patient referrals. *Docket Document No. 117.* We look first to the second and third enumerated allegations, pertaining to audits, and then assess the viability of Plaintiffs' claims relating to loss of business and network exclusion.

1. **Audits and Audit-Related Payment Withholdings**

The purported class representatives did not testify to having been threatened in any way consistent with the Count VII allegations regarding audits and payment withholdings based on those audits. Dr. Allende testified that he was never threatened with an audit by Triple-S. *Docket Document No. 157, Exh. 6, pp. 71-72.* Dr. Asparo, Dr. Zayas, and Dr. Ortiz all stated that they had never been audited or threatened in any way by Triple-S, *Id., Exh. 7, p. 51; Exh. 8, p. 40; Exh. 9, p. 140,* though Dr. Ortiz later reversed this assertion in an unsworn affidavit. *Docket Document No. 205, Exh. 13, ¶ 10.* Mr. Martínez testified that neither he nor his laboratory had ever been threatened. *Docket Document No. 157, Exh. 10, p. 101.* Both Ms. Rolón and Ms. Rodríguez testified that they had never been threatened. *Id., Exh. 11, pp. 69-70; Exh. 12, pp. 92, 96.* Mr. Sánchez testified that he had never been threatened with an audit or its consequences. *Id., Exh. 13, p. 72-73.* Dr. Robledo testified that neither he nor, to his knowledge, his corporation had ever been threatened. *Id., Exh. 4, pp. 101-04.*

In short, no materials procured through merits discovery can undo the fact that the named representatives all testify (with the sole exception of Dr. Ortiz, who gave two conflicting accounts) that they were not threatened, as alleged in the complaint, with audits or payment withholdings based on audit results. Plaintiffs have attempted to mitigate the impact of this alarming deficiency in their case with: (1) unsworn declarations of Plaintiffs' proffered experts, José Ramón González and Antonio O. Marrero that it is their "understanding that Defendants use their audit practices in an abusive manner as a means of forcing the providers to accept unilateral changes to the contract...." *Docket Document No.*

205, Exhs. 1 & 2, ¶ 17, and (2) signed affidavits from the purported class representatives, all of which state in identical language that "Triple-S [and MC-21] use[their]...audit power in an arbitrary and retaliatory manner.....There is a general knowledge around the industry that audits are performed as a fishing expedition which creates a substantial inconvenience to providers." *Id., Exhs. 5, 7, 10, 11, 12, 14.* Significantly, the affidavits' language makes no attempt at suggesting that the affiants personally experienced such threats.

Left only with these self-serving, impossibly vague and unsupported declarations, we cannot in good conscience allow the allegations to go forward when none of the named plaintiffs personally take responsibility for them in a consistent manner. The very least that can be said is that Plaintiffs lack standing to bring claims for which they suffered no harm. Plaintiffs enjoy RICO "only if [they] can demonstrate (1) a violation of section 1962, and (2) harm 'by reason of' the violation." *Willis v. Lipton*, 947 F.2d 998, 1000 (1st Cir. 1991)(internal quotations excluded); 18 U.S.C. § 1964(c). None of the named Plaintiffs claim to have been harmed through audit threats; hence they have no standing to bring those claims. *See N.H. Right to Life Political Action Comm. v. Gardner*, 9 F.3d 8, 13 (1st Cir. 1996)(noting that the complaining party must satisfy Article III test for standing "throughout the litigation, not just at the moment when the complaint is filed").

Even if Plaintiffs had standing to bring the audit-related extortion claims– and here we can give the benefit of the doubt to Dr. Ortíz, whose unsworn affidavit contradicted her sworn deposition testimony with the unsupported assertion that she 'was once threatened with an audit"– the claims are not actionable because Plaintiffs had no "pre-existing statutory

right" to be free from audits- an issue that we explore in greater detail below. *George Lussier Enters. v. Subaru of New England, Inc.*, 393 F.3d 36, 50 (1st Cir. 2004). In fact, Triple-S's contract with the providers explicitly authorizes the use of audits and stipulates that the Triple-S Board of Directors "may cancel the contract of that participating doctor who does not allow, prevents, or hinders an audit." *Docket Document No. 160, Exh. B, p. 31.*

2. **Whether The Remaining Extortion Claims Are Actionable**

Mr. Varela testified that he had been threatened with being expelled from MC-21's and/or Triple-S's private contract agreement if he did not also sign a contract for the public contract, known as "the Reform." *Docket Document No. 183, pp. 184-187.* Although Ms. Rolón testified in deposition that she had never been threatened by Triple-S, in a subsequently admitted affidavit she claimed that her laboratory had been threatened with a contract cancellation unless she accepted changes to the contract terms. *Docket Document No. 205, Exh. 9, ¶ 10.* Mr. Sánchez testified to Triple-S's "take it or leave it" approach: "either you take the payments the way they are, or [they] just cancel the contract so you stay out of the system." *Docket Document No. 157, Exh. 13, p. 74.* Dr. Allende testified to being threatened in the sense that Triple-S would refuse to reimburse him for a medical procedure associated with a particular code number ("CPT code"), but would instead reimburse him at a rate associated with a lower CPT code, unless he submitted evidence showing that he performed a more advanced procedure corresponding with the higher coding level. *Docket Document No. 157, Exh. 6, p. 72.*

We do not find these allegations, premised on the assertion that Defendants used economic fear to force their will on Plaintiff providers, actionable. "[E]xtortion of money induced by fear of economic loss" is actionable, *United States v. Hathaway*, 534 F.2d 386, 393 (1976), but only "if the plaintiff had a pre-existing statutory right to be free from the defendant's demand." *George Lussier Enters.*, 393 F.3d at 50; *see also United States v. Cruzado-Laureano*, 404 F.3d 470, 481 (1st Cir. 2005). Indeed, "the fear of economic loss is a driving force of our economy that plays an important role in many business transactions." *George Lussier Enters.*, 393 F.3d at 50 (quoting *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 523 (3d Cir. 1998)). Plaintiffs have no pre-existing statutory right to be Triple-S network providers or to receive Triple-S' referrals, and hence have no property interest on which to base their claims. *George Lussier Enters.*, 393 F.3d at 50 (conditioning car dealers' access to vehicles on acceptance of distributors' conditions "does not amount to a wrongful demand to constitute a component of coercion"); *Brokerage Concepts*, 140 F.3d at 526 (Healthcare insurance company's refusal to include pharmacy in provider network because pharmacy failed to accept conditions of inclusion constitutes "an example of hard bargaining rather than extortion."); *United States v. Sturm*, 870 F.2d 769, 773 (1st Cir. 1989)("[F]or the purposes of the Hobbs Act, the use of legitimate economic threats to obtain property is wrongful only if the defendant has no claim of right to that property."); *Robert Suris Gen. Contractor Corp. v. New Metro. Fed. Sav. & Loan Ass'n*, 873 F.2d 1401, 1405 (11th Cir. 1989) (Successful extortion theory requires that "fear of economic loss is separate and distinct from performance on the contract"; claim cannot be maintained when the "only fear of economic loss is that which accompanies any party to a contract when he suspects that compliance and compensation may not be forthcoming.");

Koerpel v. Heckler, 797 F.2d 858, 863 (10th Cir. 1986)(holding that medical provider had no property interest in inclusion in Medicare reimbursement plan: "A mere expectation of entitlement is insufficient to create a property right.").

The tactics alleged by Dr. Allende and Mssrs. Varela, Sánchez and Rolón constitute, at most, "lawful hard-bargaining" and, therefore, do not support a Hobbs Act claim for relief. *George Lussier Enters.*, 393 F.3d at 51. We are not persuaded by Plaintiffs' insistence that Triple-S's "overwhelming market dominance" pushes their bargaining tactics into the pale of unlawful coercion. *Docket Document No. 205*. The only case Plaintiffs' cite in support of this ambitious theory is *Brokerage Concepts*, in which the court suggested, in dicta, that antitrust laws could be potentially implicated if a monopolistic power exerted undue influence over its customers. 140 F.3d at 526 n.23. As Plaintiffs fail to allege antitrust violations as a part of their RICO suit, we find *Brokerage Concepts'* footnoted dicta on antitrust suits to be inapposite. We have found no legal authority for the proposition that the § 1951 definition of extortion expands according to the size and influence of the alleged extortionist. To the contrary, we point to *Koerpel*, in which the court found that a doctor did not have a property interest in Medicare reimbursements, notwithstanding the doctor's almost complete reliance on his status as a Medicare provider for his livelihood. 797 F.2d at 860. We do not welcome this case as an opportunity to expound a new theory of law pertaining to extortion cases, and so do not find the allegation that Triple-S is a monopoly to be relevant to Plaintiffs' Hobbs Act claims. We therefore find that Plaintiffs's count VII extortion allegations are unsupportable.

IV.

Conclusion

Plaintiffs' RICO claims are predicated on allegations that Defendants violated the mail and wire statutes and the Hobbs Act. *Docket Document No. 117*; 18 U.S.C. §§ 1341, 1342, 1951. However, Plaintiffs' contention that Defendants committed RICO predicate violations is clearly unsupportable at trial.

In accordance with the foregoing, we award summary judgment in Defendants' favor. Plaintiffs' RICO claims are **DISMISSED**. Judgment to be entered accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 4th day of May, 2006.

s/José Antonio Fusté
JOSE ANTONIO FUSTE
Chief U. S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civil No. 03-1967 (JAF)

[Filed March 17, 2006]

JOSE SANCHEZ, et al.,
Plaintiffs,

v.

TRIPLE-S MANAGEMENT CORPORATION, et al.,
Defendants.

ORDER TO SHOW CAUSE

Before this court are two pending motions, accompanied by the usual legion of replies, sur-replies, and amendments. *Docket Document Nos. 149, 156-58, 160-64, 177-79, 185, 187, 192.*

Plaintiffs move for class certification under Federal Rule of Civil Procedure 23. *Docket Document No. 149*; FED. R. CIV. P. 23 (2005). Defendants TSM and MC-21 ("Defendants") oppose class certification, arguing that:

(1) the named class representatives lack standing to sue under RICO; (2) Plaintiffs have failed to establish Rule 23(a)'s typicality and adequacy requirements; and (3) Plaintiffs have not demonstrated that common issues of law and fact predominate over individual issues. *Docket Document Nos. 157, 170.* Plaintiffs replied to Defendants' objection. *Docket Document No. 177.* Defendants issued sur-replies. *Docket Document Nos. 185, 187.*

Meanwhile, Defendants move to compel arbitration, urging that any disputes arising from Plaintiff Providers' service contracts with Triple-S must be referred to arbitration, in accordance with the respective service contract terms. *Docket Document No. 158.* Plaintiffs object, arguing that: (1) Defendants waived their right to compel arbitration by failing to exercise the right in a timely manner; and (2) Physician Plaintiffs' RICO claims are specifically exempted from the arbitration requirement. *Docket Document No. 179.* Defendants reply. *Docket Document No. 192.*

We have carefully reviewed the parties' filings. However, at this juncture, we will decide neither the class certification motion nor the motion to compel arbitration. Instead, we will explain our reasons for leaving these issues at least temporarily unresolved, and for guiding this case toward possible disposition through the present order to show cause.

In arguing against class certification, Defendants conflate issues that directly pertain to Rule 23(a)– e.g., typicality and commonality– with foundational standing issues that implicate the lawsuit's merits, such as the named class representative deponents' collective failure to recount having suffered a RICO-cognizant injury. Although the questions surrounding

standing more properly belong in a motion for summary judgment, they pose a potentially fatal blow to the entire case. The factual record generated in the course of class certification discovery provides substantial support for Defendants' arguments. In fact, Defendants' arguments and the corresponding facts are so compelling that we find it would be a poor use of resources to proceed with class certification or even compelling arbitration without first establishing whether this case is even remotely viable.

I.

Proper Methodology for Addressing Defendants' Objections

Defendants aver that Plaintiffs lack the explicit Rule 23(a) class certification attributes of typicality, commonality, and adequacy of representation. *Docket Document No. 157.* As an additional argument against class certification, Defendants argue that notwithstanding the allegations contained in the amended complaint, Plaintiffs clearly demonstrated in deposition that they did not suffer any RICO-cognizant injuries at all, lack standing, and so are unqualified to be certified as class representatives. *Docket Document No. 157.*

Plaintiffs respond that we need not tarry with the standing issue, as: (1) we already addressed standing in our March 7, 2005, opinion and order; and (2) standing is not an appropriate topic for discourse in determining class certification. *Docket Document No. 115; 177.*

In our earlier opinion and order, we looked to each component of the RICO standing requirements[1] to determine which plaintiff classes, if any, had standing to bring which of the complaint's twelve counts. *Docket Document No. 115* Only some Plaintiff classes– those who alleged having suffered tangible harm directly caused by Defendants' fraudulent and extortionist practices– were deemed to have standing to bring the surviving counts. *Id.*

Even though the issue has already been addressed as to whether the complaint's allegations are sufficient to confer RICO standing, Defendants can argue that Plaintiffs lack standing in a factually-supported motion for summary judgment, in which case Plaintiffs may no longer rest on the allegations in their complaint but must instead show the existence of a genuine factual dispute. *See Anderson v.*

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[1] In order to establish RICO standing, a plaintiff must allege that he was "injured in his business or property by reason of a violation of section 1962....A plaintiff enjoys standing under section 1964(c) only if he can demonstrate (1) a violation of section 1962, and (2) harm 'by reason of' the violation. The harm alleged may be either 'direct' or 'indirect,' so long as it 'flows from' the predicate acts. Mere 'cause in fact' is insufficient to confer RICO standing, however, since section 1964(c) establishes a proximate cause requirement as well." 18 U.S.C. § 1964(c); *see Willis v. Lipton*, 947 F.2d 998 (1st Cir. 1991) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-96 (1985); *Pujol v. Shearson/Am. Express, Inc.*, 829 F.2d 1201, 1205 (1st Cir.1987); *Bass v. Campagnone*, 838 F.2d 10, 12 (1st Cir. 1988)); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21,23 (2d Cir. 1990). Plaintiffs must allege a property loss. *McNally v. United States*, 483 U.S. 350, 360 (1987); *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990) ("Actual injury, that is financial loss or injury, is required to recover under RICO.").

Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)("[I]n the face of the defendant's properly supported motion for summary judgment, the plaintiff [can] not rest on his allegations...to get to a jury without 'any significant probative evidence tending to support the complaint.'")(quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)); *see also United States v. AVX Corp.*, 962 F.2d 108, 114 n.6 (1st Cir. 1992)(conducting "record-wide search for facts" to support standing inquiry); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)(declining to reach merits of appeal because record indicated lack of standing).

We agree with Plaintiffs' argument that an objection to class certification is not the proper vehicle through which to attack Plaintiffs' standing. None of Rule 23(a)'s requirements, strictly construed, implicate standing concerns. *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 694 (D.C.Pa. 1973)("It must be noted that the question of standing is totally separate and distinct from the question of plaintiff's right to represent a purported class under Rule 23....Standing to sue is an essential threshold which must be crossed before any determination as to class representation under Rule 23 can be made."). It is true that courts have discussed standing in the context of adequacy of representation and typicality inquiries, but only in instances in which the unnamed class members' injuries are more defined or pervasive than the injuries of the named representatives. *See, e.g., E. Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403, 405-06 (1977)("[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members....The mere fact that a complaint alleges [injury] does not in itself ensure that the party who has brought the lawsuit will be adequate representative of those who may have been the real victims...."); *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 216 (1974)(class

representative must "possess the same interest and suffer the same injury" as members of the class); *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962)(finding that claimants not alleging injury lack standing and so "cannot represent a class of whom they are not a part"); *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1409-10 (D.C. Cir. 1988) (looking to the named representatives' individual circumstances in finding that they lacked standing); *LaMar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973)(importing standing doctrine into typicality analysis in concluding that plaintiff could not represent class of all those who had dealt with the defendants when the plaintiff himself had dealt with only one defendant); *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 78 (D.P.R. 2005) ("Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class.").

In marked contrast to the above cited examples, the named claimants to the present action allege having suffered the exact same injuries as their unnamed fellow classmates. *Docket Document No. 117*. The complaint is predicated upon the transmission of thousands of fraudulent mailing and wire transmittals to the plaintiff classes. *Id.* If the transmittals were not fraudulent, then no one, named or unnamed, suffered a RICO predicate injury. Therefore, the possibility that the purported class representatives lack standing strikes at the heart of the lawsuit's viability, and preempts consideration of the class certification question. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976)(class action adds nothing to question of standing and plaintiffs may not rely on injury to unidentified class members to establish their standing to represent class."); *Walters v. Edgar*, 163 F.3d 430, 432-33 (7th Cir. 1998) (Posner, R.)("[I]f the named plaintiffs lacked standing when they filed

the suit, there were no other party plaintiffs to step into the breach created by the named plaintiffs' lack of standing; and so there was no case when class certification was sought."); *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 734 (3d Cir. 1970)("[A] predicate to [a plaintiff's] right to represent a class is his eligibility to sue in his own right. What he may not achieve himself, he may not accomplish as a representative of a class."); *cf. Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997)(not reaching standing issue for unnamed class members with unripe claims because issue rendered moot by denial of class certification).

Although we are mindful of the requirement that a determination on class certification should be made "as soon as practicable," *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1334 (1st Cir. 1991), we shy away from addressing the paramount standing concerns within the context of a class certification decision because class certification is not the proper mechanism through which "to conduct a preliminary inquiry into the merits of a suit." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974)("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.").

Finally, we note that it is hardly extraordinary for us to find the issues raised in Defendants' objection to class certification as probative to issues that go to the heart of the case's viability. "[T]he class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Coopers & Lybrand v. Livesday*, 437 U.S. 463, 469 (1978) (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558

(1963)). We, therefore, proceed with a preliminary review of the issues that the parties must address in compliance with the present order to show cause.

II.

Whether Plaintiffs Have Standing

A. Issues Not in Need of Further Deliberation

Before moving to the standing issues that we believe require immediate and serious attention by both parties, we will pass some judgment upon several of Defendants' less compelling objections to standing.

Defendant TSM maintains that neither of the two named representatives for the subscriber class, Lydia Ayala or Daisy Morales, are able to prove that they suffered injuries under counts IV and VIII (the subscriber class' two surviving claims) by reason of a § 1962 violation, which is necessary to confer standing. *Docket Document No. 157.*

1. Count IV

Count IV alleges that Defendant TSM and its related affiliates fraudulently overcharge Triple-S subscribers for the service co-payments and insurance premiums. *Docket Document No. 117.* Defendant TSM avers that Plaintiffs Ayala's and Morales' health insurance premiums and co-payments were determined by "arm-length negotiations" between their respective employers and Triple-S. As a result, Defendants claim, "any alleged overcharge of premiums, co-payments and co-insurance is the result of these

negotiations, not of any fraudulent scheme by Triple-S." *Docket Document No. 157.*

The possibility that premiums and co-payments were negotiated by a third party is not relevant to whether Plaintiffs Ayala or Morales suffered a direct injury caused by a § 1962 violation. Count IV alleges that Defendants distorted and manipulated data in order to misrepresent Defendants' underlying costs, and then transmitted communications that fraudulently induced Plaintiff Subscribers to accept lower reimbursement percentages and higher charges than what was agreed upon by contract. *Docket Document No. 117, p. 34-37.* We cannot fathom how this allegation is incompatible with the possibility that the contract terms were negotiated by Plaintiffs' employers. To the extent that Defendant TSM is claiming the allegation is untrue because the cost-distribution terms were negotiated in advance by Plaintiffs' employers, or because Triple-S "has no say in the amount of benefits plaintiff is entitled to," *Docket Document No. 157*, this is an assertion that goes to the merits of the suit, but is not relevant to an inquiry on standing or, for that matter, class certification.

2. **Count VIII**

Count VIII alleges the implementation of a wrongful scheme to transfer funds to Defendant MC-21 by concealing and hoarding rebates and price reductions; reporting inflated medication prices to subscribers; and defrauding Plaintiff Providers and Subscribers into paying higher prescription fees.

Defendants argue that under *Maio v. Aetna, Inc.*, 221 F.3d 472 (3d Cir. 2000), Plaintiff Subscribers lack standing

to complain of poor healthcare service, as the allegation does not comprise an "injury to property." *Docket Document No. 157* (citing *Maio*, 221 F.3d at 488).

Maio is inapposite because the *Maio* plaintiffs complained solely on the basis of poor quality healthcare service 221 F.3d at 479 (Plaintiffs' intention is "to challenge only the *quality* of health care services that Aetna arranged for and provided....'")). Here, Plaintiffs allege that they were defrauded into paying inflated fees through the MC-21 conversion scheme. As discussed in our earlier opinion and order, *Docket Document No. 115*, the allegations articulate an actionable loss of property.

Nevertheless, Plaintiffs Ayala and Morales' deposition testimony raises questions about whether, as the complaint alleges, they received fraudulent mail and wire communications in relation to their allegedly inflated medical costs. We turn to this issue now, with regards not only to Plaintiffs Ayala and Morales' claims, but also to the other named representatives' claims.

B. Presence of RICO-Predicate Injury

In order to maintain standing, Plaintiffs must support their allegation that Defendants advanced their nefarious RICO scheme through the commission of fraudulent communications, or, in the case of Count VII, extortion.

The fraudulent mail and wire communications "must be intended to deceive another, by means of false or fraudulent pretenses, representations, promises, or other deceptive conduct." *McEvoy Travel Bureau v. Heritage Travel, Inc.*, 904 F.2d 786, 791 (1st Cir. 1990); *see also Schultz v. Rhode*

Island Hosp. Trust Nat'l Bank, N.A., 94 F.3d 721, 731 (1st Cir. 1996).

Under the Hobbs Act, 18 U.S.C. § 1951 (2000 & Supp. 2004), Plaintiffs' Count VII allegations of extortion must be substantiated by proving "extortion of money induced by fear of economic loss." *United States v. Hathaway*, 534 F.2d 386, 393 (1976). The alleged threat must be premised on an illegality: "the obtaining of property of another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official light." 18 U.S.C. § 1951; *United States v. Cruzado-Laureano*, 404 F.3d 470, 481 (1st Cir. 2005); *George Lussier Enters. v. Subaru of New England, Inc.*, 393 F.3d 36, 50 (1st Cir. 2004)("[E]conomic fear is wrongful under the Hobbs Act if the plaintiff had a pre-existing statutory right to be free from the defendant's demand.").

Plaintiffs further must show that they suffered some harm by reason of the violation. "The harm alleged may be either direct or indirect, so long as it flows from the predicate acts. Mere cause in fact is insufficient to confer RICO standing, however, since section 1964(c) establishes a proximate cause requirement as well." *Willis Lipton*, 947 F.2d 998 (1st Cir. 1991)(internal quotations excluded); 18 U.S.C. § 1964(c).

1. <u>Plaintiff Subscribers</u>

While the allegations in the complaint are plead with some particularity- they describe specific fraudulent information that was transmitted on specific dates or within a limited time range- the deponents expressed little or no familiarity with having received any such fraudulent transmissions. When asked, "[is] your complaint . . . limited to a situation in which

the deductible was higher than the price of the medication?" Ms. Ayala answered, "yes;" when asked whether she had any documents "that support this fraud that you allege?" she answered, "no." *Docket Document No. 157, Exh. 1, p. 42, 50.* When asked if she received any of the mail and wire transmissions in paragraph 131 of the amended complaint– the communications that were allegedly commissioned in furtherance of the scheme to overcharge Ms. Ayala's plaintiff class– she answered, "no." *Id. at p. 63*; *Docket Document No. 117, ¶ 131.*

Ms. Morales, like Ms. Ayala, described her interest in this case as focusing on an allegedly fraudulent increase in insurance deductibles. *Docket Document No. 157, Exh. 3, p. 25-26.* Ms. Morales brought a document to her deposition which allegedly indicated what she was being charged for her medical services through Triple-S. *Id. at p. 40.* Presumably, Ms. Morales showed the document as evidence that she was being overcharged by Triple-S. However, when given multiple opportunities to describe how this or any other communication that she received were in furtherance of the overcharging scheme, Ms. Morales failed to establish even the most tenuous nexus. *Id. at p. 40, 45-47.*

2. **Plaintiff Providers**

The deposition transcripts of the named representatives for the Plaintiff Provider class, including those representing the physician, laboratory, medical facility, and pharmacist sub-classes, suggest a pervasive failure to be able to articulate having suffered injury by reason of mail and wire fraud or through extortion.

a. **Physician Sub-Class**

Dr. Néstor Allende testified that he was injured in that he would submit claims to Triple-S for medical procedures identified by a particular code number ("CPT code"), and, in a practice described in the complaint as a "downcoding," *Docket Document No. 117, ¶ 148*, Triple-S would refuse to pay Dr. Allende at the rate associated with the CPT code. *Docket Document No. 157, Exh. 6, 71.* Instead, Triple-S would send him a letter requiring him to submit evidence to substantiate that he performed a more advanced procedure corresponding with the higher coding level. If Dr. Allende submitted a lower CPT code, associated with a simpler procedure and a lower fee, he would not be required to submit additional information. Dr. Allende characterized Triple-S' communication asking for additional information as a "threat" to induce him to submit a code for a lower payment, *id. at 72*, an allegation that we do not find compelling under the Hobbs Act because it does not suggest that he was threatened with the loss of a pre-existing right. *See Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 523 (3d Cir. 1998)(holding that plaintiff failed to state an extortionate predicate act because plaintiff had no pre-existing right to be a network provider, and thus free of economic fear). When asked whether the threatening letters contained any "fraudulent" communications, Dr. Allende responded, "nothing." *Id. at 73.* Further, in contrast to the allegations contained in the complaint, *Docket Document No. 117, ¶ 148* ("without prior notice"), Dr. Allende admitted that he was provided an opportunity to submit documentation to substantiate the higher fee, i.e., "that the code corresponded to the service provided." *Docket Document No. 157, Exh. 6, 74.* Only if Dr. Allende failed to submit supporting evidence of a more advanced procedure would his claim be down-coded. *Id. at 77.* When asked again whether

this practice was fraudulent, Dr. Allende responded, "that is not fraudulent." *Id. at 75.*

Dr. Allende stated that he was injured by the Count VI practice described as "fraudulent concealment." *Id. at 83.* The complaint alleges that Plaintiff Providers would receive explanations of payments ("EOPs") that, inter alia, fraudulently concealed: (1) "the actual manner in which the...payment requests were processed so as to induce them to accept reduced payments"; and (2) "the manner in which [Defendants] actually process requests for payment by taking affirmative actions to keep it secret." *Docket Document No. 117, ¶ 153-154.* When asked to describe incidents in which Dr. Allende suffered as a result of this fraudulent activity, he referred only to the letters that he received notifying him that his claim would be down-coded unless he submitted evidence supporting the higher code. *Docket Document No. 157, Exh. 6, 83-84.* Dr. Allende admitted that the letter explained that his "payment was going to be lowered if [he] didn't send the letter" and stated "what was going to happen to [his] claim," but, in some vague effort to maintain his allegation of fraudulent concealment, nevertheless insisted that the letter "didn't explain the process of how they were doing it." *Id. at 84-85.*

Like Dr. Allende, Dr. Rosa Asparo's interest in the case focuses on Triple-S' practice of allegedly coercing her into submitting claims under CPT codes with lower payment rates than the rates for codes that she would otherwise submit. *Id. at 27* ("I felt obligated...to lower the codification of my invoices...."). Dr. Asparo was unable to identify any specific instances in which she submitted claims and the claim was down-coded, much less an instance in which a down-coding was committed through mail or wire fraud. *Id. at 33-34.*

Instead, Dr. Asparo stated that she currently practices in partnership with her husband, and prior to her joining his practice, he received a down-coding letter from Medicare. *Id. at 35.* When asked how she suffered as a result of the down-coding practice described in the amended complaint, *Docket Document No. 117, ¶ 144*, Dr. Asparo responded, "indirectly." *Docket Document No. 157, Exh. 7, 45.* Dr. Asparo also stated that she "had not received any communication" pertaining to Triple-S's down-coding practice, and that Triple-S had never actually down-coded a claim by her. *Id. at 46-47.* Dr. Asparo also stated that she had never been audited or threatened by Triple-S. *Id. at 51.*

Dr. José Zayas testified in deposition that he suffered injury as a result of the bundling practices described in the amended complaint. *Docket Document No. 117, ¶ 149*; *Docket Document No. 157, Exh. 8, 32.* Specifically, Dr. Zayas stated that he submits claims for payment containing a series of different CPT codes to Triple-S, and that Triple-S refuses to recognize some of the codes individually, but instead considers them as mere components of the other codes in the claim, thereby reducing the total fee amount. *Id. at 34-37.* Dr. Zayas stated that the bundling practice was explained in the EOPs that he received from Triple-S, and that the EOPs contained "nothing hidden" or "concealed" in the sense that they explained that codes were being bundled. *Id. at 37, 68, 84-85.* Dr. Zayas further admitted that Triple-S had distributed a circular to providers fully disclosing how the bundling practice would be executed, while insisting that specific codes later affected by bundling were not listed in the circular. *Id. at 95.*

Dr. Zayas testified that he suffered injury as a result of the practice described in the amended complaint, *Docket Document No. 117, ¶ 210*, in which Defendants "doctors to

prescribe and patients to buy" prescription drugs that are not necessarily the best for the patients' condition. *Id.* However, Dr. Zayas was unable to articulate how he suffered an injury as a result of this practice. *Docket Document No. 157, Exh. 8, 76, 98* ("It doesn't affect me. It affects the patients"). Dr. Zayas testified that he is not implicated by the down-coding or capitation agreement allegations. *Id. at 81-83.*

Dr. Carmen Ortiz testified that she suffers as a result of the down-coding and bundling practices described in Count VI, though her description of the down-coding practice essentially relates to the low fees associated with each CPT code. *Document No. 157, Exh. 9, p. 110-130.* Like the other named class representatives, however, Dr. Ortiz was unable to identify any instances of fraudulent communications associated with the down-coding practice. Dr. Ortiz also complained that she was affected by Triple-S's refusal to recognize modifier codes, though again was unable to identify an instance of mail or wire fraud associated with this refusal. *Id. at 135.* Instead, she admits that Triple-S's refusal to recognize certain modifiers may be justified by her patients' coverage policies. *Id. at 139.*

As the above summary indicates, neither Drs. Allende, Asparo, Zayas, nor Ortiz are alleging a single incident of mail or wire fraud. The allegations of down-coding and bundling involve no incidents of fraudulent concealment, nor rely upon any transmissions that in any way are misleading or fraudulent as the complaint clearly alleges. *Docket Document No. 117, ¶ 147-149.* The single allegation involving a refusal to recognize modifiers, put forward by Dr. Ortiz, also has nothing whatsoever to do with mail or wire fraud and does not suggest that provider class members' fee claims are "willfully fraudulently ignored." *Id., ¶ 150-51.* None of the

physician named representatives were able to identify a single incident of fraudulent concealment, as alleged in the complaint. *Id.*, ¶ *152-54.*

b. **Pharmacist Sub-Class**

Plaintiff José Valera, a pharmacist and class representative for the pharmacist sub-class, described an electronic payment process involving Defendant MC-21's payment processing system that he suggested was a fraudulent practice committed through mail and wire transmissions. *Docket Document No. 183, p. 80-90.* Specifically, Mr. Valera described a system that required him to pay for claim submissions, then denied those claims under vague pretenses, and then only after a series of costly claim submissions indicate an underlying prohibitive problem with the claim that, had it been identified from the beginning, would have obviated the need for multiple submissions. *Id., at p. 84-85.* Mr. Varela admitted that Defendants clearly disclosed how and what they were charging in relation to the claim submission process, *Id. at 244*, an admission which severely undermines the allegations of mail and wire fraud.

Plaintiff Varela also failed to indicate how he was directly injured from the rebate and capitation allegations contained in Count VI of the complaint, and how the rebate and capitation schemes were implemented through the use of mail and wire fraud. *Id. at p. 259, 278* ("Q: And where does MC-21's obligation to extend the rebates to the pharmacies come from? A: [I]t's not that they have an obligation no."). In fact, Mr. Varela seemed to ascribe much of his financial loss to physicians, rather than Defendant MC-21. *Id. at p. 169.* Further, Mr. Varela was unable to convincingly argue that he had been threatened or coerced by Defendants- threatened in

an actionable sense- as alleged in the complaint. *Id. at p. 184-89, 204. See United States v. Sturm*, 870 F.2d 769, 773 (1st Cir. 1989)(holding that "there is nothing inherently wrongful about the use of economic fear to obtain property" unless the plaintiff had a pre-existing right to be free from the demand). Regarding the allegedly fraudulent practice of changing the list of medications covered under Triple-S and MC-21's plans, without notice, Mr. Varela was unable to attribute the objectionable activity to a named defendant to this action. *Id. at 217.*

Mr. Varela's experiences with the Count VIII allegations involving illegal spreads are not particularly suggestive of fraudulent practice, as he admits that Defendant MC-21 had no obligation to disclose the price lists on which it based payments and reimbursements. *Id. at 260-62.*

c. **Laboratory Sub-Class**

The named representatives for the laboratory sub-class, José Sánchez, Orlando Martínez, Delma Rodríguez, and Maite Rolón, complained about Triple-S' practice of bundling claims and unilaterally lowering payments. *Docket Document No. 157, Exh. 10-13.*

Mr. Martínez' testimony focused in large part on reduction of payments to laboratories by Triple-S and Medicare, but is totally bereft of any allegations of fraudulent concealment or fraudulent communications pertaining to the payment reductions and bundling practices. *Docket Document No. 157, Exh. 10, p. 56-60, 68.* Discussing the EOPs- the very communications mentioned as fraudulent in the complaint, *Docket Document No. 117, ¶ 152* - Mr. Martínez was asked, "you have the necessary tools to know what was

done with [illegible] claim, right?" and Mr. Martínez responded, "that's right." *Id. at p. 88.* When asked, "so you know everything that could happen to your claim?," he responded, "That's right." *Id. at p. 95.* "There is nothing hidden, *licenciado*, right?" "Well, there is nothing hidden....At least in the documentation that Triple-S sent me it's explicit." *Id. at p. 97.* Mr. Martínez disavowed any involvement with allegations pertaining to down-coding, capitation agreements, and modifiers. *Id. at p. 90-91.* Mr. Martínez further testified that his laboratory had never been subject to threats. *Id. at 101.*

Ms. Rolón, like Mr. Martínez, testified that she did not have any claims against Triple-S involving capitation agreements, down-coding, modifiers, or coercive threats. *Docket Document No. 157, Exh. 11, p. 22, 70.* Ms. Rolón testified to some confusion as to interpreting the EOPs when a certain type of billing practice called "Automated Test Procedures" ("ATP") was first implemented by Medicare and later adopted by Triple-S, but admits that she received circulars explaining the process and notifying her of the ATP system's implementation, and to having learned to understand the system many years ago. *Id., p. 37-38, 47.*

Ms. Rodríguez, a medical technician and the owner of a medical laboratory, also complained about the use of ATPs. *Docket Document No. 157, Exh. 12, p. 68.* Like Ms. Rolón, Ms. Rodríguez admits to having received circulars clearly notifying her of how the ATPs would be implemented. *Id., p. 68-70.* Ms. Rodríguez' complaint regarding ATPs was exclusively focused on the fact that she receives less money under the new system: "It's paying less than what the work you are doing is worth." *Id. at p. 71; see also id. at p. 90.* In this respect, Ms. Rodríguez shared the same exact grievance

against Medicare as she did against Triple-S, although she has not taken any action in protest of the federal program's policies. *Id. at p. 71, 79.* She was unable to associate her injury in this regard to a fraudulent communication or concealment, and admitted to receiving all of the circulars explaining the ATP process. *Id. at p. 72-80, 89.* Ms. Rodríguez testified that she had never been threatened or even audited by Triple-S. *Id. at p. 92, 96.* Ms. Rodríguez did not articulate any claims involving Triple-S's handling of modifiers. *Id. at p. 94.*

Mr. Sánchez, the owner of five clinical laboratories and a laboratory supply warehouse, also testified as a laboratory sub-class representative. *Docket Document No. 157, Exh. 13.* Mr. Sánchez' testimony focused on the ATP system adopted by Medicare in 1998 (at Congress's behest) and Triple-S in 2001. *Id. at p. 41-43.* Although at first Mr. Sánchez insisted that Triple-S adopted the ATP policy retroactively and without warning, *id. at p. 42*, he later conceded that the policy did not actually take effect until after Triple-S notified laboratories of the new policy. *Id. at p. 46.* Mr. Sánchez testified that he did not use modifiers for his Triple-S claims, and also that he had never been audited or threatened with an audit. *Id. at p. 72-73.* Mr. Sánchez alleged that Triple-S had threatened him in that if he did not accept their payment policies, his contract would be nullified and he would lose business accordingly. *Id. at p. 74.* Unless Mr. Sánchez can demonstrate a pre-existing statutory right to a contract with Triple-S, this type of threat is not actionable as extortion under the Hobbs Act. *See George Lussier Enters.*, 393 F.3d at 50 (distinguishing between "lawful hard-bargaining" and "unlawful extortion"); *Brokerage Concepts, Inc.*, 140 F.3d at 523; *Sturm*, 870 F.2d 769 at 773.

d. **Independent Practice Association ("IPA") Sub-Class**

Dr. Miguel Roblendo testified regarding the use or misuse of capitation agreements by Triple-S to injure IPAs, which are corporations that contract for service with medical insurance providers. Dr. Roblendo testified to having accepted a settlement agreement pertaining to his allegations. *Docket Document No. 157, Exh. 4, p. 122-24.* Dr. Roblendo further testified to no longer being involved with an IPA. *Id. at 124.* Together, these two facts seems to preclude his participation in this suit, though we invite further briefing on this issue by both parties before drawing any conclusions.

3. **Summary of Deficiencies**

Glaringly absent, throughout all of the deposition testimony, is an allegation– necessary to establish standing under the mail and wire fraud statutes– that the claimants received "communications 'in furtherance' of a scheme 'intended to deceive [them], by means of false or fraudulent pretenses, pretenses, representations, promises, or other deceptive conduct.'" *Schultz v. Rhode Island Hosp. Trust Nat'l Bank, N.A.*, 94 F.3d 721, 731 (1st Cir. 1996)(quoting *McEvoy Travel*, 904 F.2d at 791 (explaining that mail fraud requires both deceit and deprivation)); *see also N. Bridge Assoc. Inc. v. Boldt*, 274 F.3d 38, 43 (1st Cir. 2001)("It is not enough for a plaintiff to file a RICO claim, chant the statutory mantra, and leave identification of the predicate acts to the time of trial.")(citing *Feinstein*, 942 F.2d at 42); 18 U.S.C. §§ 1341, 1342, 1961(1)(B). Plaintiffs' Count IV, VI, and VIII claims are predicated on the mail and wire fraud statutes and so are in immediate risk of being dismissed unless

Plaintiffs can convincingly show how the statutes were factually implicated.

Plaintiff Provider class representatives' assertion that they had been threatened by Triple-S in the sense that they were forced to accept its contract terms in order to be Triple-S network providers is insufficient to sustain their Count VII cause of action under the Hobbs Act. As we have intimated throughout this order, mere hard-bargaining, even in the form of a "take it or leave it" posture, is not extortion, absent the threat of deprivation of a pre-existing statutory right. *See George Lussier Enters.*, 393 F.3d at 50; *Brokerage Concepts, Inc.*, 140 F.3d at 523; *Sturm*, 870 F.2d 769 at 773; 18 U.S.C. § 1951.

In short, the purported named representatives failed entirely to establish standing under RICO, i.e., that they suffered a direct injury as a result of a RICO predicate act. Their failure in this regard falls in clear contrast to the amended complaint, which describes in vivid detail the existence of communications which fraudulently concealed and manipulated information to underpay the provider class and overcharge the subscriber class.

We accept and acknowledge the possibility that the deposed claimants are not trained in the practice of complex class action litigation, and so their testimony as to whether or not their injuries were incurred through the transmission of "fraudulent" communications or the infliction of "extortion" relies on a possibly incomplete understanding of various terms of art. Nevertheless, we would be derelict in our duties if we were to proceed with the pending motions without paying heed to the marked dissonance between the allegations in the complaint and the testimony put forward by the class

representatives. Under *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), we are authorized to initiate this inquiry to determine whether the factual record is capable of sustaining the allegations in the complaint. *See Leyva v. On the Beach, Inc.*, 171 F.3d 717, 719-20 (1st Cir. 1999)(requiring court to give "the targeted party appropriate notice and a chance to present its evidence on the essential elements of the claim"). For this reason, we give Plaintiffs a last opportunity to present a crystal clear picture of how their allegations are factually supported. We recognize that the parties have only engaged in class certification discovery, and that Plaintiffs will likely argue that they are limited in this regard. However, given that the present case is predicated on fraudulent communications that were delivered to the claimants and on acts of extortion that were inflicted directly upon them, we find it simply incredible that Plaintiffs are unable to find some evidence to support their claims, if the claims are supportable. If the deposition testimony is any indication, this litigation is shortlived.

Additionally, Plaintiffs should address the issue of whether parties who are either no longer insured through Triple-S or no longer practicing providers (e.g., Ms. Ayala, Mr. Varela, and Dr. Roblendo) have standing to bring claims for injunctive relief.

III.

Conclusion

In accordance with the foregoing, we **ORDER** Plaintiffs to show cause **within ten (10) working days** as to why summary judgment should not be awarded against them. Defendants may reply **within five (5) working days** after

Plaintiffs' compliance. The parties are expected to frame their responses in strict compliance with the requirements of Fed. R. Civ. P. 56.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 17th day of March, 2006.

s/José Antonio Fusté
JOSE ANTONIO FUSTE
Chief U. S. District Judge

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No. 07-353

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOSE SANCHEZ, *et al.*,

Petitioners,

v.

TRIPLE-S MANAGEMENT, CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS TRIPLE-S MANAGEMENT, CORP., TRIPLE-S, INC., SEGUROS TRIPLE-S, INC., SEGUROS DE VIDA TRIPLE-S, INC., INTERACTIVE SYSTEMS, INC., TRIPLE-C, INC., AND ACCESO-SALUD, INC.

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition, where the First Circuit's Opinion affirming the District Court's determination that on the facts of this case discovery was sufficiently advanced to require the Petitioners to show cause why summary judgment should not be granted does not conflict with a decision of this Court or a Court of Appeals.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Triple-S Management, Corp. is a privately held company that does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

Respondents Triple-S, Inc., Seguros Triple-S, Inc., Seguros de Vida Triple-S, Inc., Interactive Systems, Inc., Triple-C, Inc., and Acceso-Salud, Inc., are all wholly owned by Triple-S Management, Corp.

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INTRODUCTION

The Petitioners lost their RICO case before the District Court after it became clear from their own admissions that none of them had suffered the harm alleged in their complaint. This deficiency first came to the District Court's attention during briefing on the Petitioners' motion for class certification. At that point, the District Court did precisely what this Court's decisions required it to do. It gave the Petitioners specific notice of what it found troubling about the Petitioners' testimony, informed the Petitioners that it was considering granting summary judgment because of those deficiencies, and issued an order to show cause why summary judgment should not be granted requiring the Petitioners to come forward within ten business days with whatever evidence they had in support of their claims.

The Petitioners responded to that order with affidavits and arguments. What the Petitioners failed to do, however, was to explain why their own admissions were not fatal to their case, or how any additional discovery could possibly remedy the damage that those admissions caused. The District Court then properly granted summary judgment, and the First Circuit properly affirmed that grant of summary judgment as being entirely consistent both with its own precedents and the precedents of this Court.

Now, in a final effort to revive their dismissed lawsuit, Petitioners have sought certiorari on a single narrow issue among the several issues presented in their appeal to the First Circuit. Reduced to its core, they ask

this Court to determine whether the Circuit Court correctly decided that the District Court had allowed sufficient discovery prior to issuing its show cause order. Whether discovery is sufficiently advanced to allow summary judgment is a case-specific inquiry, but in an effort to recast this case as one that meets the standard of Supreme Court Rule 10, the Petitioners have been forced to ignore or distort the true posture of their case. When this case is viewed in context, the Circuit Court's decision that the District Court acted within its discretion is entirely consistent both with the settled law of this Court and the law of other circuits.

To be sure, the Petitioners have attempted to frame their question more broadly, alleging that they were denied the opportunity to present their case on a "full" evidentiary record. As the Circuit Court recognized, "voluminous" discovery had already occurred in the case and the flaws in the Petitioners' case that resulted in the grant of summary judgment arose from the Petitioners' own admissions. They did not, and could not, explain how any further discovery would undo the damaging nature of those admissions.

Neither this Court nor any Circuit Court has ever held that discovery must be complete prior to consideration of summary judgment – it must only be sufficiently advanced to provide parties opposing summary judgment a fair opportunity to gather and come forward with their evidence. A contrary rule would violate both the text of Federal Rule of Procedure 56 and the policies underlying summary judgment as articulated by this Court. Certainly, the Circuit Court's determination on appeal that the District Court acted

within its discretion in issuing its show cause order is precisely the type of supervisory decision that is both routine and proper. The Respondents thus respectfully request that the Court deny the Petition.

STATEMENT OF THE CASE

This purported class-action lawsuit was brought against Triple-S Management Corporation and its subsidiaries (collectively, including the predecessor corporation, "Triple-S"), all for-profit corporations organized under Puerto Rico law, and other Respondents, for alleged violations of the Racketeer-Influenced and Corrupt Organizations Act ("RICO"). The complaint described a sweeping master scheme (i) to acquire control of the allegedly charitable assets of Triple-S; (ii) to "capitalize" (increase) those assets; and (iii) ultimately to "convert" (distribute) those assets for the benefit of members of the RICO enterprise. (Pet. 5a.) In furtherance of that scheme, Respondents and other members of the RICO enterprise allegedly committed twelve RICO violations, each of which was the subject of a separate count in the complaint as originally filed. *Id.*

Respondents moved to dismiss the complaint, and the District Court eliminated all but four of the claims: Counts IV, VI, VII, and VIII. (Pet. 6a, 33a.) Counts IV, VI, and VIII were based on predicate acts of mail and wire fraud. Count VII claimed predicate acts of extortion under the Hobbs Act. (Pet. 33a.) Petitioners did not appeal dismissal of their other eight RICO claims to the Circuit Court. (Pet. 6a & n.1.)

The remaining Petitioners purportedly represented two classes: a "providers' class," composed of persons who provided medical services or products to patients insured by Triple-S (Pet. 5a); and a "subscribers' class," composed of persons who were insured by or beneficiaries of any medical plan and/or the public health care reform administered by Triple-S (Pet. 5a). The "provider's class" was further divided into four sub-classes: "individual medical doctors;" "medical services association or corporations" (purportedly represented by independence practice associations or "IPAs"); "medical laboratories;" and "pharmacies." (Pet. 66a.)

Following the order of dismissal and Petitioners' subsequent filing of an Amended Complaint, the parties proposed a joint scheduling order that was adopted as an order by the District Court. That order called generally for a phase of class discovery followed by briefing on class certification and a phase of merits discovery, but it had two additional significant features: (1) it expressly acknowledged the parties' understanding that "class certification discovery [would] in part overlap with merits discovery;" and (2) it provided that the parties could file dispositive motions prior to the final deadline for doing so "if they underst[ood] that the issue(s) [were] ripe." (Pet. 16a.)

Pursuant to that order, the parties conducted class-action discovery, which included class-related merits discovery, after which Petitioners' moved for class certification. (Pet. 7a-8a.) In opposing class certification, Respondents called the Court's attention to Petitioners' individual unequivocal deposition testimony that no Plaintiff had suffered any injury because of a RICO

violation. (Pet. 76a.) In light of that showing, the District Court issued an extensive order for Petitioners to show cause why summary judgment for Respondents should not be ordered, explaining why it found Respondents' testimony problematic and what Respondents needed to show in order to forestall summary judgment. (Pet. 55a-78a.) The District Court observed that

> [a]lthough the questions surrounding standing more properly belong in a motion for Summary judgment, they pose a potentially fatal blow to the entire case. . . . Respondents' arguments and the corresponding facts are so compelling that we find it would be a poor use of resources to proceed with class certification . . . without first establishing whether this case is even remotely viable.

(Pet. 56a-57a.)

In its show-cause order, the Court was deeply concerned by the fact that a number of admissions by Petitioners during their depositions clearly contradicted the allegations in the Amended Complaint. For example, the Court pointed out that the following admissions jeopardized the viability of Petitioners' claims:

- Petitioners admitted that letters sent by Triple-S regarding coding practices contained nothing "fraudulent" in them and provided Petitioners an opportunity to submit documentation substantiating a higher fee or code. (Pet. 67a-68a.)

- Petitioners admitted that explanation of payment forms ("EOPs") received by them explained exactly what was going to happen to a claim and contained nothing hidden or concealed. (Pet. 69a.)

- The information provided in the circular letters sent by Triple-S alerted Petitioners to the allegedly fraudulent behavior. (Pet. 69a, 73a.)

- In fact, documentation provided by Triple-S was explicit as to what was being done with Petitioners' claims. (Pet. 73a.)

- Petitioners were unable to identify instances of fraudulent communications associated with the alleged downcoding practices. (Pet. 68a, 70a.)

- Petitioners purportedly representing the pharmacy subclass admitted that Respondents clearly disclosed how and what they were charging in relation to the claim submission process. (Pet. 71a.)

- Petitioners admitted that they had never been threatened with an audit or audited by Triple-S or otherwise had suffered extortion-based injury, an essential element of an extortion claim. (Pet. 69a, 74a, 76a.)

After reviewing these admissions in detail, the District Court then provided Petitioners with a clear listing of what issues they needed to address in order to withstand summary judgment. (Pet. 75a-77a.)

It specifically recognized that full discovery had not yet been completed. (Pet. 77a.) However, the Court was emphatic in stating that, since this case was predicated on allegedly fraudulent communications **delivered to Petitioners**, it was "simply incredible that [Petitioners] are unable to find some evidence to support their claims, if the claims are supportable." (*Id.*) The order to show cause depended wholly on Petitioners own admissions. The Court did not cite a single line of deposition testimony provided by Respondents during class certification discovery. In other words, in their response to the Courts' Order to Show Cause, Petitioners were only up against themselves.

Petitioners responded to the District Court's Order to Show Cause by filing affidavits by them and by two purported "experts." (Pet. 45a, 49a-50a.) Those affidavits failed utterly to offer support for Petitioners' claims of RICO mail fraud and extortion. (54a.) In significant respects, Petitioners' affidavits contradicted their own deposition testimony. E.g., (Pet. 49a.) After receiving Petitioners' response to the Show Cause Order, Respondents' reply and a sur-reply by Petitioners, the District Court issued an extensive Opinion and Order granting summary judgment to Respondents on the four remaining counts, and entered judgment dismissing the case. (Pet. 31a-54a.) That judgment was predicated on Petitioners' failure to overcome the fatal deficiencies in their own testimony. (Pet. 47a-48a, 52a-53.)

REASONS FOR DENYING THE PETITION

The Petitioners insist that both the District Court and the Circuit Court erred by failing to allow them "full" discovery before being required to stave off summary judgment. The Petitioners make this argument without significant analysis of the particular state of discovery in this case, and indeed with barely any reference to the record at all. By doing so, they essentially ask that this Court depart from the context-sensitive determination about how much discovery is appropriate for a given case prior to summary judgment that it has heretofore sanctioned, and adopt a new blanket rule allowing a court to entertain summary judgment only after all discovery is complete.

The Court should decline this opportunity to upset well-settled law in favor of a rule at odds with the text of Federal Rule of Civil Procedure 56 and its own articulated policy behind summary judgment.

A. The Law Regarding *Sua Sponte* Summary Judgment.

The law regarding *sua sponte* grants of summary judgment is well settled. "[D]istrict courts are widely acknowledged to possess the power to enter summary judgment *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Before a court can grant *sua sponte* summary judgment, two conditions must be satisfied: (1) discovery must be sufficiently advanced for the summary judgment target to know what evidence likely can be mustered,

and (2) the target must have received appropriate notice. *Id.*; *Rogan v. Menino*, 175 F.3d 75, 79 (1st Cir. 1999); *see Leyva v. On The Beach, Inc.*, 171 F.3d 717, 719 (1st Cir. 1999); *Berkovitz v. HBO, Inc.*, 89 F.3d 24, 29 (1st Cir. 1996). Here, the Petitioners do not and cannot challenge the adequacy of notice provided by the District Court.

The Petitioners instead contend only that discovery was not sufficiently advanced for the District Court to entertain summary judgment. By doing so, they occasionally give lip service to the "sufficiently advanced" requirement. E.g., (Pet. 16) (acknowledging that this Court has required only "adequate discovery"), (Pet. 17) (acknowledging that in the First Circuit discovery need only be "sufficiently advanced"). In order to attempt to give this argument an air of plausibility, however, the Petitioners primarily urge the Court to impose a standard of "full" or "complete" discovery. E.g., (Pet. 12) ("full evidentiary record"), (Pet. 13) ("complete evidentiary record"), (Pet. 15) ("full evidentiary record," "after full discovery had occurred," and "full discovery record"), (Pet. 16) ("full evidentiary record").

"Full" in the sense of "complete" discovery is not the law. Rule 56 itself provides that a claimant may seek summary judgment "at any time after the expiration of 20 days from the commencement of the action," Rule 56(a), and that a defending party may so move "at any time, Rule 56(b). *Sua sponte* summary judgment – in other words summary judgment initiated by the trial court – is no different provided the party opposing has adequate notice. *Celotex*, 477 U.S. at 325. Indeed,

Celotex, in which the phrase "full discovery" does appear, does not stand for the proposition that discovery must be complete before summary judgment can be granted, as is evidenced by the context from which Petitioners have snatched that language. 477 U.S. at 325. The Court noted in *Celotex*:

> The parties had conducted discovery, and no serious claim can be made that respondent was in any sense 'railroaded' by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

Id. (citation omitted). In this context, it is clear that "full discovery" means the same as "sufficiently advanced," i.e. that "both parties have had a reasonable opportunity to present any material evidence in their favor." *Bank v. Int'l Business Machines Corp.*, 145 F.3d 420, 431 (1st Cir. 1998).

In other words, *sua sponte* summary judgment is proper not only after complete discovery, but also when it is "clear that further discovery would be of no benefit." *Ramsey v. Coughlin*, 94 F.3d 71, 74 (2d Cir. 1996). In such instances, the record must "reflect the losing party's inability to enhance the evidence supporting its position and the winning party's entitlement to judgment." *Id.* One reason this might occur is when the issue presented is purely a "question of law which does

not depend on the development of further facts." *Diaz v. City of Fitchburg*, 176 F.3d 560, 562 n.2 (1st Cir. 1999). Another reason would be that the evidence already adduced in the particular case is dispositive of the merits. That situation is precisely what occurred in this case.

B. The District Court's Decision To Consider Summary Judgment When It Did Was Properly Grounded In Its Determination That Discovery Was Sufficiently Advanced.

Tellingly, Petitioners present their argument without reference to the specific state of the case at the time the District Court issued its show cause order. Petitioners either skirt over or do not disclose the following: (i) that there was extensive deposition discovery of Respondents, Petitioners and others (Pet. 8a); (ii) that the document discovery furnished by Respondents was "voluminous," (Pet. 8a) (iii) that the scheduling order, although it called for the sequencing of discovery with class action discovery first, also provided that dispositive motions could be filed whenever the parties believed the issues were ripe (Pet. 7a-8a); (iv) that the scheduling order acknowledged that there would be a degree of overlap between class-action discovery and merits discovery (Pet. 7a); and (v) that Respondents did not seek via Rule 56(f) an extension of time for further discovery after the show-cause order (Pet. 9a). Most importantly, Petitioners do not disclose that the fatal defects in their case were established by their own testimony — both as to the fraud-based counts and the extortion-based count — and that no conceivable further discovery could affect what Petitioners themselves had admitted. (Pet. 11a-12a.)

It is well-settled that "class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Coopers & Lybrand v. Livesday*, 437 U.S. 463, 469 (1978). The parties acknowledged from the beginning of the case that discovery on class certification and the merits necessarily would overlap. (Pet. 7a.) Without citation to the record, Petitioners allege that intersection between merits discovery and class certification discovery was merely "some minor and insignificant overlap" on "very narrowly restricted issues on the merits." (Pet. 19.) That statement is incorrect, as the above citations to the record demonstrate.

Federal Rule of Civil Procedure 56(f) provides a mechanism for requesting leave to conduct additional discovery before entry of summary judgment. Notably, Petitioners did not invoke that mechanism here.[1] (Pet. 9a.) Even if they had attempted to do so, the effort

1. A motion under Rule 56(f) must, among other things, "set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist," and "indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." *Simas v. First Citizens' Federal Credit Union*, 170 F.3d 37, 46 n.4 (1st Cir. 1999) (citation omitted). Petitioners' submission in opposition to the show cause order failed to point out with any level of specificity what facts would be elicited from the number of additional documents they claim they would have requested had discovery continued. Instead, they claimed that the fraudulent scheme was too difficult for a layperson even to comprehend, and that their experts needed to sort through an unidentified mass of discovery before they would even be able to articulate the alleged fraudulent scheme. (Pet. 10a-11a, 44a-45a).

would have been futile. The conclusion that Petitioners have no reasonable likelihood of proving their claims arises directly from their own admissions rather than from any evidentiary issues or defenses raised by Respondents. The District Court correctly ordered Petitioners to demonstrate whether there was any acceptable explanation for the fact that their deposition testimony was fundamentally at odds with the allegations of their Amended Complaint, including the allegations of mail and wire fraud, which Petitioners had the burden of pleading with particularity. Based upon the Petitioners' showing, the District Court ruled as follows:

"In short, the purported named representatives failed entirely to establish standing under RICO, i.e., that they suffered a direct injury as a result of a RICO predicate act." (Pet. 76a.) It found "simply incredible" that Plaintiffs, who supposedly received fraudulent communications and suffered acts of extortion, were "unable to find some evidence to support their claims, if the claims are supportable." (Pet. 77a.) After reviewing Petitioners' submission addressing these deficiencies, the situation was no better. The District Court concluded that the "materials available to us now show unequivocally that Defendants did not engage in either mail and wire fraud or extortion in their dealings with Plaintiffs – both quintessentially 'essential elements' to Plaintiffs' case." (Pet. 36a.)

Taking all these facts together, the District Court's conclusion that discovery was sufficiently advanced to make ruling on summary judgment appropriate was

manifestly correct.[2] Furthermore, the Circuit Court decision that the District Court did not abuse its discretion so holding is beyond reproach.

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2. The Petitioners also appear to suggest that the District Court improperly mingled Rule 23 class certification issues with Rule 56 summary judgment issues. (Pet. 13-14.) That fundamentally misreads the District Court's actions, however. It did not rule that class certification of the claims brought by Petitioners was inappropriate. (Pet. 58a-61a.) Rather, it expressed concern, and ultimately ruled, that **these particular Petitioners** could not proceed with their case at all because **their own admissions** showed that they had not suffered the harm alleged in the Complaint. E.g., (Pet. 75a-77a.) The District Court thus properly set aside the class certification question and required the Petitioners to show cause why summary judgment should not issue against them. (Pet. 61a-62a.) The class certification briefing merely brought the deficiencies in the Petitioners' claims to light. Once those deficiencies were clear, the District Court properly called upon the Petitioners to account for those deficiencies, if they could, by means of the order to show cause. The procedures were clear and distinct for the District Court, and Petitioners' attempt to conflate them is a red herring.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition, and there is none. Respondents therefore respectfully request that the Petition be denied.

Respectfully submitted,

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TRIPLE-S MANAGEMENT, CORP., *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MC-21 CORPORATION

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QUESTION PRESENTED

Whether the First Circuit's opinion affirming the District Court's decision to defer the class-certification determination to consider the merits of the case, and then ordering summary judgment *sua sponte* after giving notice to Petitioners and given the sufficiently advanced stage of discovery, conflicts with the decisions of this Court or a Court of Appeals, or departs from the accepted and usual course of judicial proceedings.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent MC-21 Corporation is wholly owned by Orbix HealthCare Corporation, which is not publicly held.

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INTRODUCTION

This case is about the District Court's exercise of its inherent power to weed out untenable claims. It does not call for this Court to exercise its supervisory power. The deficiencies in Petitioners' RICO-based claims became evident during briefing on class certification. Those deficiencies stemmed from Petitioners' own admissions. Confronted with them, the District Court found it unwise to go forward with the class-certification determination. Instead, the District Court decided to consider the viability of Petitioners' claims and ordered Petitioners to show cause why summary judgment should not enter against them.

Petitioners responded by challenging the District Court's procedural approach as unprecedented. They argued that *sua sponte* summary judgment could not be entered until discovery was complete. Petitioners nevertheless did not seek an extension of time to respond to the order to show cause, nor did they invoke the mechanism of Federal Rule of Civil Procedure 56(f). Instead, they presented hundreds of pages of evidentiary materials, including their own affidavits and the affidavits of two purported experts. The District Court found those materials insufficient to create a trial-worthy issue and properly entered summary judgment for Respondents. On appeal, the First Circuit affirmed that decision.

Petitioners now seek certiorari on whether the First Circuit correctly affirmed the District Court's decision deferring the class-certification determination to consider the merits of the case, and then ordering

summary judgment *sua sponte*. Petitioners maintain that the District Court "converted" Respondents' oppositions to class certification into a *sua sponte* motion for summary judgment by conducting an impermissible inquiry into the merits of the case, and that it improperly entered summary judgment *sua sponte* without a "full" evidentiary record.

Nothing forbids a district court from deferring a ruling on class certification to assess the viability of a claim. The District Court properly determined that the circumstances warranted to first assess whether Petitioners' claims were viable. The District Court acted within its discretion in ordering Petitioners to show cause why summary judgment should not be entered. It gave Petitioners clear guidance on what they needed to show to avoid dismissal and afforded them ten working days to come forward with their evidence. By then, discovery was sufficiently advanced for the District Court to accurately determine whether a genuine issue of material fact existed, and for Petitioners to know what evidence could likely be adduced.

Upon Petitioners' failure to demonstrate the existence of any issue worthy of trial, the District Court entered summary judgment against them. The First Circuit's opinion affirming that decision comports with the decisions of this Court and other Courts of Appeals, and is consistent with the accepted and usual course of judicial proceedings. The Court, therefore, should deny the Petition.

STATEMENT OF THE CASE

Petitioners brought this lawsuit against Triple-S Management Corporation and its subsidiaries (collectively, "Triple-S") and MC-21 Corporation ("MC-21"), on behalf of several putative classes of providers of health care services under the policies issued by Triple-S, and on behalf of persons insured under those policies. (Pet. 5a.) The complaint charged Respondents with a scheme to defraud Petitioners through a pattern of mail and wire fraud and extortion, in violation of the Racketeer-Influenced and Corrupt Organizations Act ("RICO"). (Pet. 5a-6a.) Among those allegedly wronged by the scheme were members of a putative pharmacist sub-class purportedly represented by named plaintiff José Varela ("Varela"). (Pet. 71a.) MC-21 administered prescription drug benefits under the policies issued by Triple-S. (Pet. 5a, n.1.)

The District Court dismissed eight of the twelve counts in the original complaint upon motion by the Respondents. Petitioners then filed an amended complaint re-pleading the four counts that survived dismissal, identifying them with the same numbers used in the original complaint. (Pet. 6a.) Counts IV, VI and VIII of the amended complaint charged predicate acts of mail and wire fraud.[1] Count VII was predicated on extortion in violation of the Hobbs Act. (Pet. 6a-7a, 33a.) Petitioners did not appeal the dismissal of the other eight counts. (Pet. 6a, n.2.)

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1. Count VIII was additionally predicated on violation of the Medicare Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b) (Supp. 2006). However, Petitioners subsequently waived that theory. (Pet. 7a, n.3.)

Subsequent to the amended complaint, the parties filed a joint proposed scheduling order that was approved by the District Court. That order provided for two phases of discovery, bridged by briefing on class certification. The first discovery phase would cover class certification issues; the second one, the purported merits of Petitioners' claims. (Pet. 7a.) The order, however, expressly acknowledged that "class certification discovery [would] in part overlap with merits discovery." Although the deadline for filing dispositive motions was set for after the completion of merits discovery, the scheduling order expressly allowed the parties to file dispositive motions before such deadline "if they underst[ood] that the issue(s) [were] ripe." (Pet. 16a.)

Following several months of extensive document and deposition discovery that touched upon issues bearing directly on the purported merits of the case, Petitioners moved for class certification. (Pet. 8a, 35a.) In their respective oppositions, Respondents argued that Petitioners had not sustained any RICO injury, and therefore lacked standing to bring this suit. (Pet. 8a, 56a-57a.) Respondents based those arguments mainly on Petitioners' own deposition testimony, including Varela's. The District Court found those arguments "and the corresponding facts . . . so compelling," that instead of deciding the class-certification issue, it ordered Petitioners to show cause why summary judgment should not be entered against them. (Pet. 57a & 77a.) To proceed with class certification under those circumstances, the District Court reasoned, would have been "a poor use of resources." (Pet. 57a.)

In its show-cause order, the District Court explained why it found Petitioners' claims unsupportable. It

indicated what Petitioners needed to show to withstand summary judgment and afforded Petitioners ten working days to do so. (Pet. 75a-78a.) Petitioners responded by challenging the District Court's procedural approach, arguing that *sua sponte* summary judgment could not be entered until they had had an opportunity to complete the discovery permitted by the scheduling order. They did not seek an extension of time to respond to the order to show cause. (Pet. 9a.) They also did not invoke the mechanism of Fed. R. Civ. P. 56(f). Instead, Petitioners submitted hundreds of pages of evidentiary materials, including their own affidavits and the affidavits of two purported experts. (Pet. 9a.)

Those materials, the District Court found, "unequivocally [showed] that [Respondents] did not engage in either mail and wire fraud or extortion in their dealings with [Petitioners]." (Pet. 36a.) The District Court also determined that additional discovery would not assist Petitioners in any way, and therefore denied Petitioners any further discovery. (Pet. 11a, 36a, 42a-43a.) Thus, having concluded that Petitioners had failed to establish an actionable RICO claim, the District Court entered summary judgment for Respondents. (Pet. 9a-12a, 41a-54a.)

On appeal, Petitioners challenged the District Court's decision on procedural and substantive grounds. Procedurally, Petitioners maintained that the District Court erred in entering summary judgment before affording them an opportunity to complete the merits discovery allowed by the scheduling order. Substantively, they argued that the evidence presented in response to the show-cause order sufficed to create a trial-worthy

issue. (Pet. 12a.) The Circuit Court rejected those arguments and affirmed the District Court's entry of summary judgment. (Pet. 25a.)

As to Petitioners' procedural challenge, the Circuit Court first stated that it had never ruled that a district court cannot enter summary judgment *sua sponte* before discovery has been completed. (Pet. 13a.) Rather, a district court need only "wait until the parties have enjoyed a reasonable opportunity —not necessarily the full duration of the discovery period— to glean the material facts." (Pet. 13 a.) (Internal quotation marks and footnote omitted.) Under the circumstances, the Circuit Court determined that Petitioners had enjoyed such reasonable opportunity. This conclusion drew largely from the fact that discovery was sufficiently advanced when the District Court ordered summary judgment, and that the District Court had based its decision mostly on Petitioners' own deposition testimony. (Pet. 14a-15a.) The Circuit Court also determined that the District Court had afforded Petitioners adequate notice and an opportunity to present their evidence on the essential elements of their claims. Finally, the Circuit Court found that, because the District Court's scheduling order expressly allowed the parties to file dispositive motions prior to the deadline for doing so, Petitioners "could not reasonably have believed . . . that they would under no circumstances have to oppose summary judgment prior to the completion of merits discovery." (Pet. 16a.)

Before this Court, Petitioners seek review only of the procedural aspects of this case under the standard of Supreme Court Rule 10(a).

REASONS FOR DENYING THE PETITION

Petitioners argue that the Circuit Court erred in affirming the "conversion" of Respondents' oppositions to class certification into a *sua sponte* motion for summary judgment, and the entry of summary judgment without a "full" evidentiary record. Contrary to what Petitioners maintain, the Circuit Court's opinion does not conflict with the decisions of this Court or a Court of Appeals, nor departs from the accepted and usual course of judicial proceedings. The Court, therefore, should deny the Petition.

A. The District Court Properly Deferred the Class-Certification Determination to Consider the Merits of the Case.

Petitioners argue that the District Court improperly "converted" Respondents' opposition to class certification into a *sua sponte* motion for summary judgment by inquiring into the merits of Petitioners' claims while determining whether the case could be maintained as a class action. (Pet. 13-14.) According to Petitioners, this approach is proscribed by this Court's opinion in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) and Fed. R. Civ. P. 23. Petitioners' argument is an incorrect characterization of the District Court's actions, as well as a misstatement of the law.

The District Court was well aware of its duty and so expressed it. In fact, it agreed with Petitioners that "an objection to class certification is not the proper vehicle through which to attack . . . standing," nor "the proper mechanism through which 'to conduct a

preliminary inquiry into the merits of a suit.'" (Pet. 59a & 61a, *quoting Eisen*, 417 U.S. at 177-78.) However, because Respondents' arguments and the corresponding facts so compellingly showed that Petitioners' claims were not viable, the District Court determined that it would not decide Petitioners' motion for class certification, and instead would consider, as a separate matter, whether Petitioners had any cognizable claim under RICO. (Pet. 56a.) Before doing that, the District Court in its show-cause order explained in detail the deficiencies in Petitioners' claims, indicated what Petitioners needed to show to withstand summary judgment and gave them ten working days to come forward with their evidence. (Pet. 75a-78a.) Nothing in *Eisen* or in Rule 23 forbids this approach, and it is not unprecedented.

Eisen and Rule 23 do not mandate that the class-certification determination take precedent over a ruling on the merits. Rule 23(c) does establish that the court must determine whether a case may be maintained as a class action "at an early practicable time." Yet this requirement does not mean that a district court must under all circumstances postpone a ruling on the merits, if warranted, until after the class-certification issue is decided. *See Greenlee County v. United States*, 487 F.3d 871, 880-81 (D.C. Cir. 2007); *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 92-93 (D.C. Cir. 2001); *Floyd v. Bowen*, 833 F.2d 529, 534-35 (5th Cir. 1987); *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984) (all holding that neither *Eisen* nor Rule 23 require a district court to determine whether a case may be maintained as a class action before ruling on the merits).

An absolute rule forbidding a district court from considering the merits of a case before determining whether it may be maintained as a class action would result, as the District Court in this case recognized, in a waste of the court's and the parties' resources in cases, like this one, which are not viable. *See* MANUAL FOR COMPLEX LITIGATION, Fourth, § 21.133 (2004) (suggesting that "courts should rule early on motions to dismiss, challenging whether the plaintiffs have stated a cause of action," since "[e]arly resolution of these questions may avoid expense for the parties and burdens for the court and may minimize the use of the class action process for cases that are weak"). The Advisory Committee's note on the 2003 amendments to subdivision (c)(1) of Rule 23 further recognizes, as one of the circumstances justifying the postponement of the class-certification determination, the possibility that "[t]he party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified."

B. *Sua Sponte* Summary Judgment Was Appropriate.

"[D]istrict courts are widely acknowledged to possess the power to enter summary judgment *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Only two conditions limit that power: (1) that the targeted party is given notice and an opportunity to present its evidence on the essential elements of its claim or defense, and (2) that discovery is sufficiently advanced for the court to accurately determine whether a genuine issue of

material fact does or does not exist, and for the litigants know what material evidence likely can be proffered. *See Frederique-Alexandre v. Dept. of Nat. and Envtl. Resources of Puerto Rico*, 478 F.3d 433, 438-39 (1st Cir. 2007); *Leyva v. On The Beach, Inc.*, 171 F.3d 717, 720 (1st Cir. 1999); *Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24, 29 (1st Cir. 1996). Those conditions were met in this case.

1. Petitioners Were Given Notice and an Opportunity to Present Evidence in their Favor.

In its show-cause order, the District Court explained the deficiencies in Petitioners' claims, warned Petitioners of its intention to dispose of those claims summarily, and gave Petitioners ten working days to show why summary judgment was not warranted. The notice requirement, therefore, was fully met in this case. *See Leyva*, 171 F.3d at 720 ("In the context of a *sua sponte* summary judgment, 'notice' means that the targeted party 'had reason to believe the court might reach the issue and received a fair opportunity to put its best foot forward.'"); *Stella v. Tewksbury Mass.*, 4 F.3d 53, 56 (1st Cir. 1993) (the district court must afford the targeted party "the benefit of the minimum 10-day period mandated by Rule 56").

2. Discovery Was Sufficiently Advanced.

"Sufficiently advanced" discovery means simply that the evidentiary record is such that the court is in a position to "make an accurate determination on whether a genuine issue of material fact does or does not exist, and, relatedly, . . . [that] the litigants know what material

evidence likely can be adduced." *Stella*, 4 F.3d at 55 (citations and internal quotation marks omitted). Discovery in this case was sufficiently advanced for the District Court to enter summary judgment *sua sponte*, as the record shows.

During the course of several months, the parties exchanged voluminous written discovery, and the depositions of the named Petitioners and of corporate representatives of Respondents were taken. (Pet. 8a, 15a.) That discovery "touched upon issues that [bore] directly on the case's merits[,] . . . [and] revealed with unusual clarity that [Petitioners'] claims [were] insufficient to support a cause of action." (Pet. 35a.) In response to the District Court's order to show cause, Petitioners also submitted their own affidavits and the affidavits of two purported experts. (Pet. 9a.) However, "[n]either [Petitioners'] experts' declarations —nor, by . . . [Petitioners'] own admission, their own declarations or deposition testimony— so much as hint[ed] at . . . a [fraudulent] scheme." (Pet. 21a.) "In the final analysis," the District Court noted, the alleged scheme was "something that [Petitioners] merely reasonably suspect[ed] but [could not] prove until merits discovery." (Pet. 45a.) (Internal quotation marks omitted.) "This description," the District Court ruled, was "paradigmatically antithetical" to the particularity that Fed. R. Civ. P. 9(b) requires in pleading fraud. (Pet. 45a.)

The evidence further demonstrated that Petitioners were unable to support their allegations under the Hobbs Act. (Pet. 48a-53a.) Petitioners failed to "point . . . to anything in their deposition testimony or declarations

suggesting that they" suffered direct injury as a result of the alleged Hobbs Act violations. (Pet. 24a.)

Against this background, the District Court found "no facts that [Petitioners] could conceivably uncover — or, at least, none consistent with the record . . .— so impressive as to remedy the case's deficiencies." (Pet. 36a.) It also determined that Petitioners had "no legal basis through which they [could] lay claim to continued discovery." (Pet. 43a.)

The record, therefore, amply supports the District Court's determination that discovery was sufficiently advanced to allow it to order summary judgment *sua sponte*, and that additional discovery would have been futile. The Circuit Court correctly affirmed that decision.

C. The Law Does Not Require Under All Circumstances "Full" or "Complete" Discovery Before *Sua Sponte* Summary Judgment May Be Ordered.

Petitioners argue that *sua sponte* summary judgment may be ordered only after "full" or "complete" discovery. *E.g.*, (Pet. 12 & 16) ("full evidentiary record"), (Pet. 13 & 19) ("complete evidentiary record"), (Pet. 15) ("full discovery"). There is no support for this proposition. *Sua sponte* summary judgment is not held to a standard higher than summary judgment upon motion. Federal Rule of Civil Procedure 56 governs both under the same standard. *See Berkovitz*, 89 F.3d at 29-30; *Stella*, 4 F.3d at 56. That rule does not require that

discovery be completed before a party may move for summary judgment.

Of those Courts of Appeals that have addressed the requirements for a district court to order summary judgment on its own initiative, none has established an absolute rule —as Petitioners argue— that in all cases a "full" or "complete" evidentiary record must exist before *sua sponte* summary judgment may be entered. *See, e.g.*, *Frederique-Alexandre*, 478 F.3d at 438 (notice and "sufficiently advanced" discovery); *Couden v. Duffy*, 446 F.3d 483, 500 (3rd Cir. 2006) (notice and "an opportunity to present relevant evidence in opposition"); *aaiPharma Inc. v. Thompson*, 296 F.3d 227, 235 (4th Cir. 2002) (notice and "a reasonable opportunity to be heard"); *Leffman v. Sprint Corp.*, 481 F.3d 428, 430 (6th Cir. 2007) (notice and "a reasonable opportunity to respond to all the issues to be considered by the court"); *Acequia, Inc. v. Prudential Ins. Co. of America*, 226 F.3rd 798, 807 (7th Cir. 2000) (notice and "a fair opportunity to present evidence in opposition"); *Figg v. Russell*, 433 F.3d 593, 597 (8th Cir. 2006) (notice and "an adequate opportunity to demonstrate why summary judgment should not be granted") (citation omitted); *U.S. v. Grayson*, 879 F.2d 620, 625 (9th Cir. 1989) (notice and "an opportunity to present new evidence as required by Federal Rule of Procedure 56(c)"); *Cox Nuclear Pharmacy, Inc. v. CTI, Inc.*, 478 F.3d 1303, 1312-13 (11th Cir. 2007) (notice and an "extensively developed" evidentiary record).

Even those Courts of Appeals that have expressed concern about the completeness of the evidentiary record in the context of *sua sponte* summary judgment have not established the absolute rule that Petitioners

propose. *See, e.g., Artistic Entertainment, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1202 (11th Cir. 2003) (where *sua sponte* summary judgment is ordered *without notice*, a "complete" evidentiary record is required); *Ramsey v. Coughlin*, 94 F.3d 71, 74 (2nd Cir. 1996) (*sua sponte* summary judgment may be granted when discovery is complete, *or* when it is "clear that further discovery would be of no benefit").

Petitioners cite *Celotex* for the proposition that full discovery must take place before summary judgment may be ordered. (Pet. 15). Yet *Celotex* does not support that proposition. The only reference to "full discovery" in the Court's opinion in *Celotex* should be understood in the context where it is used, as well as in the context of Rule 56 as a whole, bearing in mind that rule's purpose. In *Celotex* the Court noted:

> The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

477 U.S. at 326 (footnote omitted). The Court's reference to "full discovery" in that context should be taken merely as a reminder that a nonmovant unable to present essential facts to oppose summary judgment may resort

to taking additional discovery through the mechanism of Rule 56(f), which Petitioners did not invoke in this case.

The Court's reference cannot be taken to mean that complete discovery is necessary for the entry of summary judgment, either sought or *sua sponte* inasmuch as Rule 56 governs both, since Rule 56 expressly allows a party to move for summary judgment "at any time," in the case of a defending party or, in the case of a claimant, "at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party." Fed. R. Civ. P. 56(a) & (b). To hold otherwise would defeat one of the main purposes of Rule 56: "to isolate and dispose of factually unsupported claims or defenses." *Celotex*, 477 U.S. at 323-24 (footnote omitted).

D. Petitioners Failed to Invoke Fed. R. Civ. P. 56(f).

Petitioners complain that they were entitled to rely on the scheduling order and that they were "blindsided" by the District Court's decision to consider the merits of the case when it did. (Pet. 17.) Harboring that alleged expectation was unfounded and unrealistic. The scheduling order expressly allowed the parties to file dispositive motions before the deadline for doing so if they believed that the issues were ripe. (Pet. 16a.) If Petitioners truly believed that further discovery would have helped them to forestall summary judgment, they could have availed themselves of the mechanism of Fed. R. Civ. P. 56(f), but they did not. Petitioners cannot claim

now that they needed additional discovery. *See Kiman v. New Hampshire Dept. of Corrections*, 451 F.3d 274, 282 n.7 (1st Cir. 2006) (holding that a party affected by summary judgment who "proceeded to oppose summary judgment without filing a Rule 56(f) motion with the district court, . . . cannot not argue [on appeal] that the district court's ruling was incorrect due to insufficient discovery") (citation omitted); *cf. Resolution Trust Corp. v. North Bridge Assoc., Inc.*, 22 F.3d 1198, 1204 (1st Cir. 1994) (holding that "[i]n the absence of an applicable time limit . . . a party must invoke Rule 56(f) within a reasonable time following receipt of a motion for summary judgment").

Federal Rule of Civil Procedure 56(f) affords a party confronted with summary judgment the opportunity to "demonstrate an authentic need for, and an entitlement to, an additional interval in which to marshal facts essential to mount an opposition." *Resolution Trust Corp.*, 22 F.3d at 1203. To benefit from the rule, the movant must, among other things, "set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." *Id.* Petitioners did not meet that burden.

Petitioners' generic plea for additional discovery was insufficient to warrant Rule 56(f) relief. *See Mass. School of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26, 44 (1st Cir. 1998) (finding that plaintiff did not comply with Rule 56(f) when it failed to specify how the discoverable materials would have raised a triable issue); *C.B. Trucking, Inc. v. Waste Management, Inc.*, 137 F.3d

41, 45 (1st Cir. 1998) (finding that plaintiff's "non-specific request that the court deny the motion [for summary judgment] so that it could conduct additional discovery" did not satisfy Rule 56(f)).

CONCLUSION

Petitioners have not established any reason that calls for an exercise of this Court's supervisory power, and none exists. Respondent MC-21 therefore respectfully requests that the Petition be denied.

Respectfully submitted,

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